Pemunya Kargo atas Kapal 'Istana VI' v Pemilik Kapal atau Vesel 'Filma Satu' dari Pelabuhan Jakarta Indonesia and other actions

HIGH COURT (KUALA LUMPUR) — ADMIRALTY IN REM NOS D3–27–13 OF 2004, D7–27–9 OF 2004 AND D7–27–10 OF 2004
NALLINI PATHMANATHAN J
23 JULY 2010

Sale of Goods — Passing of property — Whether property in goods passed from seller to buyer — Sale of crude palm oil in bulk — Whether sale of unascertained goods — Whether cargo in deliverable state unconditionally appropriated to contract — Cargo stored separately and could be identified specifically on board vessel as plaintiff's cargo — Bills of lading made to order of seller — Seller reserving right of disposal pending payment of price of goods — Presumption of retention of title by seller rebutted by payment of price of goods — Goods ascertained and unconditionally appropriated to contract — Sale of Goods Act 1957 ss 23 & 25(2)

Shipping and Navigation — Carriage of goods — Bailment of goods — Whether bailee relationship established — Cargo released by shipowner to third party without bill of lading — Whether breach of duty to exercise care in discharge of cargo — Failure by shipowner to make enquiries as to entitlement to cargo prior to discharging — Whether shipowner liable as bailee for loss of cargo

Shipping and Navigation — Carriage of goods — Bill of lading — Significance and importance of — Title to sue — Whether title to property in cargo passed to plaintiff by endorsement on bills of lading — Whether plaintiff possessed title to sue in contract under Bills of Lading Act 1855 as lawful endorsee in possession of bill of lading

Shipping and Navigation — Carriage of goods — Liability of shipowner — Cargo released to third party without bill of lading — Whether shipowner guilty of conversion — Whether there was delivery of cargo to third party — Whether discharge of cargo at behest of carrier obviates shipowner's liability to owner of cargo — Whether cargo owner acquiesced to discharge of cargo at different port

Tort — Conversion — Claim in conversion — Unauthorised delivery of goods to third party without bill of lading — Whether plaintiff could maintain action in conversion — Ownership of goods — Whether property in cargo passed to plaintiff

The plaintiff in the three suits had purchased three parcels of crude palm oil in bulk, totaling 1,998.518 metric tons ('the said cargo') from an Indonesian supplier and the original seller, one Kantor Pemasaran Bersama ('KPB') on FOB ('free on board') terms. The said cargo was loaded onto the vessel, Istana VI owned by the defendant. At the material time, a charterparty agreement had been entered into with one Summerwind Trading Pte Ltd. The plaintiff claimed that pursuant to bills of lading issued by the defendant and in the plaintiff's possession as lawful endorsee, as well as shipping instructions issued by the plaintiff to the defendant, the cargo was to be carried to, and discharged at Yantai, China. However the cargo was not discharged at Yantai, China but at Port Klang, Malaysia. The plaintiff further claimed that the defendant had discharged the cargo to a third party, one Mewah Oils Sdn Bhd ('Mewah') without production of the original bills of lading, on the instructions of, and by reason of the issuance of a letter of indemnity by the charterer, Summerwind. Summerwind had intended to purchase the plaintiff's cargo of crude palm oil bound for China, and utilise it for shipment to Port Klang instead of Yantai China to fulfil certain contractual obligations. Summerwind was unable to amend their letters of credit on time and thus required the defendant's assistance to stipulate on the bill of lading that the discharge port was Yantai, China even though the parties, ie Summerwind and the defendant were aware that the destination under the charterparty agreement was Port Kelang, Malaysia. The charterers undertook to provide the defendant with a letter of indemnity to 'cover' the change in destination from China to Malaysia. Claiming as owners of the cargo of crude palm oil, the plaintiff commenced these suits against the defendant for delivery up of the cargo or alternatively to recover damages for the loss of the cargo. The defendant contended as follows: (a) that it had not delivered the said cargo to Mewah as alleged, but had merely discharged the said cargo into Mewah's bonded shore tanks in accordance with the instructions of the charterer Summerwind as well as the terms of the charterparty; (b) that the plaintiff had consented and acquiesced to such discharge into Mewah's bonded shore tanks in Port Klang; (c) that the loss sustained by the plaintiff was caused by intervening acts of third parties and omissions of the plaintiff which were outside the control of the defendant; and (d) that the plaintiff had no right of action in relation to the cargo, for want of title to sue. The issues which arose for consideration were as follows: (a) Whether the plaintiff had title to the cargo so as to bring these suits against the defendant; (b) Whether the discharge of the cargo into bonded shore tanks belonging to Mewah in Port Klang amounted to delivery; (c) Whether the plaintiff consented and authorised or acquiesced to the discharge of the cargo into Mewah's bonded shore tanks; and (d) Whether the loss suffered by the plaintiff was caused by the defendant.

Held, allowing the plaintiff's actions with costs:

(1) In order to bring an action in tort for conversion and misdelivery or

delivery in breach of their, the burden lay on the plaintiff to show that at the material time, namely between 24 and 26 October, property in the cargo had passed to it from KPB such that it was the owner. The issue of when the property in the cargo passed from the original seller, KPB to the plaintiff was not governed solely by the fob terms but by the provisions of the Sale of Goods Act 1957 ('SOGA'). The contract for the sale of the total of 1,988.518 metric tons of crude palm oil in bulk comprised a contract for the sale of unascertained goods. Under s 23 of the SOGA, it therefore had to be ascertained whether the said cargo was in a deliverable state unconditionally appropriated to the contract (see paras 37–38 & 40).

(2) The whole of the 1,998.518 metric tons was sold by one seller, KPB to one purchaser, namely the plaintiff under three fob contracts of sale. The said cargo was stored separately and could be identified specifically on board the vessel as the cargo of the plaintiff. Although the said cargo was not divided or segregated physically, it nevertheless could be ascertained as that deliverable under the three bills of lading, collectively. The fact that there was no separate allocation or segregation in relation to the bills of lading did not in itself, prohibit or preclude appropriation to the contract. Thus, there was ascertainment and appropriation of the goods to the contract (see paras 41 & 48–50).

(3) So long as the seller has not reserved the right of disposal, then he is deemed to have unconditionally appropriated the goods to the contract. In the instant case the bills of lading were made to the order of the shipper, ie KPB. As such in accordance with s 25(2) of the SOGA, KPB had reserved the right of disposal thereby precluding the passing of property from itself to the buyer plaintiff. Thus, notwithstanding delivery of the goods to the carrier for the purposes of transmission to the buyer, the property therein did not pass until the condition imposed by the seller, ie payment of the price, was fulfilled (see paras 52 & 73).

(4) The condition imposed by KPB relating to the appropriation of the goods to the contract was fulfilled when payment for the cargo was received by KPB on or by 24 October 2003. The presumption of retention of title by KPB was rebutted by such payment, whereupon the conditional appropriation of the cargo became unconditional appropriation. As such, property in the cargo passed from KPB to the plaintiff on or by 24 October 2003. When the cargo was discharged at Port Klang between 24 and 26 October the property in the cargo had passed from KPB to the plaintiff. As such, the plaintiff as owner of the cargo was entitled to maintain the action in tort in relation to 'misdelivery' or for conversion (see para 73).

(5) In order to enjoy title to sue under s 1 of the Bills of Lading Act 1855 ('BOLA'), the title to the property in the cargo must have passed to the

plaintiff from KPB either 'upon' or 'by reason of' the endorsement on the bills of lading. The plaintiff received the duly endorsed bills of lading from KPB on 24 October 2003. This showed that KPB had relinquished both property in, and possession of the cargo as of 24 October. The property in the cargo passed 'upon' or at the very least 'by reason of" the endorsement on the bills of lading. Thus, the plaintiff possessed title to sue in contract under BOLA as a lawful endorsee in possession of the bill of lading (see paras 78 & 81).

(6) The defendant had authorised discharge of the cargo to Mewah without production of the original bills of lading by reason of the letter of indemnity issued by Summerwind. The fact that the cargo was discharged into shore tanks within the control of Mewah meant that delivery was accorded to Mewah. The fact that there was no delivery order in existence did not alter the fact that the cargo was released to Mewah. Discharge, delivery or release of the cargo at the behest of the carrier, albeit under the terms of a charterparty, does not obviate the shipowner's liability to the owner of the cargo (see paras 92 & 97).

(7) It could not be inferred from the facts or circumstances that the plaintiff had consented or acquiesced to the discharge of the cargo in Port Klang to Mewah. To amount to acquiescence or consent or acceptance of this fact, the plaintiff had to know in the first place that the cargo was being discharged in Port Klang and not Yantai. It also had to know that the possession of the cargo was being given to Mewah (see para 103).

(8) The discharge of the cargo without production of the bills of lading at a port other than that represented by the bill of lading amounted to a serious misrepresentation which the defendant was fully cognisant of, yet chose to ignore when discharging the cargo to Mewah at the behest of Summerwind (see para 104).

(9) But for the discharge of the cargo into Mewah's bonded shore tanks at the behest of Summerwind without bills of lading, the loss would not have occurred. The discharging of the plaintiff's cargo into the hands of a third party at a different destination to that contracted for under the bill of lading was the event that caused the loss (see para 122).

(10) The plaintiff enjoyed locus as bailor since KPB had endorsed and transferred the original bills of lading to the plaintiff on 24 October. The plaintiff did have possession of the bills of lading at that point in time as lawful holder and endorsee thereby rendering the defendant the bailee of its cargo. The plaintiff enjoyed both title or ownership of the cargo as well as possessory rights as of 24 and 26 October. The defendant did not make any equiries as to the entitlement of the cargo prior to discharging the same. The defendant failed in carrying out its duties as bailee. As bailee the defendant was bound to deliver the cargo against surrender of the

original bills of lading. Accordingly the defendant was also liable as bailee for the loss of the cargo (see paras 129 & 131).

[Bahasa Malaysia summary

Plaintif dalam tiga guaman telah membeli tiga bahagian minyak sawit mentah secara pukal, berjumlah 1,998.518 ton metrik ('kargo tersebut') daripada pembekal Indonesia dan penjual asal, Kantor Pemasaran Bersama ('KPB') atas dasar FOB ('free on board'). Kargo tersebut telah dimuatkan ke dalam kapal, Istana VI yang dimiliki defendan. Pada masa matan, perjanjian pihak carter telah dimasuki dengan Summerwind Trading Pte Ltd. Plaintif mendakwa bahawa menurut bil-bil muatan yang dikeluarkan oleh defendan dan dalam milikan plaintif sebagai pengendors yang sah, dan juga arahan perkapalan yang dikeluarkan oleh plaintif kepada defendan, kargo tersebut sepatutnya dibawa ke, dan dipunggah di Yantai, China. Namun begitu kargo tersebut tidak dipunggah di Yantai, China tetapi di Pelabuhan Klang, Malaysia. Plaintif selanjutnya mendakwa bahawa defendan telah memunggah kargo tersebut kepada pihak ketiga, Mewah Oils Sdn Bhd ('Mewah') tanpa mengemukakan bil muatan asal, atas arahan, dan oleh sebab pengeluaran surat perlindungan oleh pengcarter, Summerwind. Summerwind telah berniat untuk membeli kargo minyak kelapa sawit mentah plaintif yang menuju ke China, dan menggunakannya untuk pengangkutan ke Pelabuhan Klang dan bukan Yantai, China untuk memenuhi tanggungjawab kontraktual tertentu. Summerwind tidak dapat meminda surat kredit mereka pada waktu ditetapkan dan oleh itu memerlukan bantuan defendan untuk menyatakan atas bil muatan bahawa pelabuhan pemunggahan adalah Yantai, China meskipun pihak-pihak, iaitu Summerwind dan defendan sedar bahawa destinasi dalam perjanjian carter adalah Pelabuhan Klang, Malaysia. Pengcarter-pengcarter telah mengakujanji untuk memberi defendan surat perlindungan untuk 'cover' perubahan destinasi dari China ke Malaysia. Plaintif yang mendakwa pemilik kargo minyak kelapa sawit mentah itu telah memulakan guaman-guaman tersebut terhadap defendan untuk menghantar serah kargo tersebut atau secara alternatif mendapatkan ganti rugi untuk kehilangan kargo tersebut. Defendan berhujah seperti berikut: (a) bahawa ia tidak menghantar serah kargo tersebut kepada Mewah seperti dikatakan, tetapi hanya memunggah kargo tersebut ke kapal terikat pesisir Mewah menurut arahan pengcarter Summerwind dan juga syarat-syarat pihak carter; (b) bahawa plaintif telah bersetuju dan memberi kebenaran terhadap pelepasan ke kapal terikat pesisir Mewah di Pelabuhan Klang; (c) bahawa kehilangan yang dialami plaintif disebabkan tindakan campur tangan pihak ketiga dan peninggalan plaintif yang di luar kawalan defendan; dan (d) bahawa plaintif tiada hak tindakan berkaitan kargo tersebut, kerana ingin hak untuk menyaman. Isu-isu yang timbul untuk dipertimbangkan adalah seperti berikut: (a) sama ada plaintif mempunyai hak ke atas kargo tersebut sehingga memulakan guaman-guaman tersebut terhadap defendan; (b) sama ada pemunggahan kargo tersebut ke kapal terikat pesisir milik Mewah di Pelabuhan Klang merupakan serahan; (c) sama ada plaintif

bersetuju dan memberi kuasa atau kebenaran untuk memunggah kargo tersebut ke kapal terikat pesisir Mewah; dan (d) sama ada kehilangan yang dialami plaintif disebabkan oleh defendan.

Diputuskan, membenarkan tindakan-tindakan plaintif dengan kos:

(1) Bagi tujuan memulakan tindakan dalam tort kerana konversi atau pelanggaran serahan, beban terletak ke atas plaintif untuk menunjukkan bahawa pada masa matan, iaitu antara 24 dan 25 Oktober, harta dalam kargo tersebut telah berpindah daripadanya kepada KPB seperti ia pemiliknya. Isu bila harta dalam kargo tersebut berpindah daripada penjual asal, KPB kepada plaintif tidak dikawal hanya oleh syarat-syarat FOB tetapi oleh peruntukan Akta Jualan Barangan 1957 ('AJB'). Kontrak jualan berjumlah 1,988.5 tan metrik minyak kelapa sawit mentah secara pukal mengandungi kontrak jualan barangan yang tidak pasti. Di bawah s 23 AJB, adalah perlu untuk dipastikan sama ada kargo tersebut dalam keadaan boleh serah diperuntukkan tanpa bersyarat dalam kontrak (lihat perenggan 37–38 & 40).

(2) Keseluruhan 1,988.5 tan metric telah dijual oleh penjual, KPB kepada pembeli, iaitu plaintif di bawah tiga kontrak jualan FOB. Kargo tersebut telah disimpan berasingan dan boleh dikenalpasti dengan spesifiknya atas kapal itu sebagai kargo plaintif. Meskipun kargo tersebut tidak dibahagi atau diasingkan secara fizikal, tetapi ia masih boleh dipastikan sebagai yang telah dihantarkan di bawah tiga bil muatan, secara kolektif. Fakta bahawa tiada pembahagian atau pengasingan berkaitan bil-bil muatan itu dengan sendirinya tidak menghalang atau mengecualikan peruntukan kontrak. Oleh itu, terdapat kepastian dan peruntukan barangan dalam kontrak itu (lihat perenggan 41 & 48–50).

(3) Selagi pembeli tidak mempunyai hak penjualan maka dia dianggap mengambil tanpa bersyarat barangan dalam kontrak itu. Dalam kes ini bil-bil muatan telah dibuat menurut pesanan pembawa kapal, KPB. Oleh itu menurut s 25(2) AJB, KPB mempunyai hak jualan dan oleh itu menghalang serahan harta itu daripadanya kepada pembeli plaintif. Dengan itu, meskipun penghantaran barangan kepada pembawa bagi tujuan penghantaran kepada pembeli, harta itu tidak dihantar selagi syarat yang dikenakan oleh penjual, iaitu bayaran harga tersebut telah dipenuhi (lihat perenggan 52 & 73).

(4) Syarat yang dikenakan oleh KPB berkaitan peruntukan barangan dalam kontrak telah dipatuhi apabila bayaran untuk kargo tersebut telah diterima oleh KPB pada atau sebelum 24 Oktober 2003. Andaian penahanan hak oleh KPB telah dicabar dengan pembayaran tersebut, di mana peruntukan bersyarat kargo tersebut menjadi peruntukan tanpa bersyarat. Oleh itu, harta dalam kargo tersebut telah berpindah daripada KPB kepada plaintif pada atau sebelum 24 Oktober 2003. Apabila kargo

tersebut dilepaskan di Pelabuhan Klang antara 24 dan 26 Oktober harta dalam kargo tersebut telah berpindah daripada KPB kepada plaintif. Oleh demikian, plaintif sebagai pemilik kargo tersebut berhak mengekalkan tindakan tort berkaitan 'misdelivery' atau untuk penukaran (lihat perenggan 73).

(5) Bagi tujuan menikmati hak untuk menyaman di bawah s 1 Akta Bil-Bil Muatan 1855 ('ABBM'), hak milik ke atas harta dalam kargo tersebut semestinya telah berpindah kepada plaintif daripada KPB sama ada 'upon' atau 'by reason' pengindorsan ke atas bil-bil muatan. Plaintif telah menerima bil-bil muatan yang telah diindorskan daripada KPB pada 24 Oktober 2003. Ini menunjukkan bahawa KPB telah melepaskan kedua-dua harta dalam, dan milikan kargo tersebut pada 24 Oktober. Harta dalam kargo tersebut telah berpindah 'upon' atau sekurang-kurangnya 'by reason of' pengindorsan bil-bil muatan. Oleh itu, plaintif mempunyai hak untuk menyaman dalam kontrak di bawah ABBM sebagai pengindors milikan sah bil muatan itu (lihat perenggan 78 & 81).

(6) Defendan telah memberi kuasa pemunggahan kargo tersebut kepada Mewah tanpa mengemukakan bil-bil muatan asal menurut surat perlindungan yang dikeluarkan oleh Summerwind. Fakta bahawa kargo tersebut telah dilepaskan di pesisir kapal dalam kawalan Mewah tidak bermaksud penghantaran telah diberikan kepada Mewah. Fakta bahawa tidak terdapat pesanan penghantaran tidak mengubah fakta bahawa kargo tersebut telah dipunggah kepada Mewah. Pemunggahan, penghantaran atau penyerahan kargo tersebut atas perintah pembawa, meskipun di bawah syarat-syarat pihak pencarter, tidak menyebabkan tiada liabiliti pemilik kapal kepada pemilik kargo (lihat perenggan 92 & 97).

(7) Inferens tidak boleh dibuat berdasarkan fakta atau keadaan bahawa plaintif telah bersetuju untuk memunggah kargo tersebut di Pelabuhan Klang kepada Mewah. Setakat mana persetujuan atau penerimaan fakta ini, plaintif perlu mengetahui terlebih dahulu bahawa kargo tersebut akan dipunggah di Pelabuhan Klang dan bukan Yantai. Perlu juga diketahui bahawa milikan kargo tersebut akan diberikan kepada Mewah (lihat perenggan 103).

(8) Pemunggahan kargo tanpa pengemukaan bil-bil muatan di pelabuhan selain daripada yang dinyatakan dalam bil mutan itu membentuk gambaran salah yang serius disedari sepenuhnya oleh defendan, namun memilih untuk tidak mempedulikannya apabila memunggah kargo tersebut kepada Mewah atas arahan Summerwind (lihat perenggan 104).

(9) Jika bukan kerana pemunggahan kargo tersebut ke pesisir kapal terikat Mewah atas arahan Summerwind tanpa bil-bil muatan, kehilangan

tersebut tidak mungkin berlaku. Pemunggahan kargo plaintif ke dalam tangan pihak ketiga di destinasi berbeza dengan apa yang dikontrakkan dalam bil muatan merupakan kejadian yang telah menyebabkan kehilangan itu (lihat perenggan 122).

(10)Plaintif menikmati kedudukan sebagai bailor kerana KPB telah mengindorskan dan memindahkan bil-bil muatan asal kepada plaintif pada 24 Oktober. Plaintif sememangnya mempunyai milikan bil-bil muatan pada masa itu sebagai pemegang dan pengindors yang sah menjadikan defendan baili kargonya. Plaintif menikmati kedua-dua hak atau hak milik kargo tersebut dan juga hak-hak pemilikan pada 24 dan 26 Oktober. Defendan tidak bertanyakan apa-apa tentang hak ke atas kargo tersebut sebelum memunggah. Defendan telah gagal melaksanakan kewajipannya sebagai baili. Sebagai baili defendan terikat untuk menghantar serah kargo tersebut selepas bil-bil muatan asal diserahkan. Sewajarnya defendan juga bertanggungjawab sebagai baili kerana kehilangan kargo tersebut (lihat perenggan 129 & 131).]

Notes

For a case on claim in conversion, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) para 93.

For cases on bailment of goods, see 11 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 1216–1220.

For cases on bill of lading, see 11 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 1221–1325.

For cases on carriage of goods in general, see 11 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 1216–1415.

For cases on passing of property in general, see 11 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 811–829.

Cases referred to

Enichem Anic SpA and Others v Ampelos Shipping Co Ltd ('The Delfini') [1990] 1 Lloyd's Law Reports 252, CA (refd)

Karlshamns Olje Fabriker v Eastport Navigation Corporation, The Elafi ('the Elafi') [1981] 2 Lloyds LR 679, HC (refd)

Leigh & Sillavan Ltd v Aliakmon Shipping Co Ltd The Aliakmon [1986] 2 All ER 145, HL (refd)

Mitsui & Co Ltd & Anor v Flota Mercante Grancolombiana SA [1988] 1 WLR 1145, CA (refd)

Port Swettanham Authority v TW Wu and Company (M) Sdn Bhd [1978] 2 MLJ 137, PC (refd)

Sewell v Burdick (1884) 10 App Cas 74, HL (refd)

Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd [1959] MLJ 200, PC (refd)

The 'Cherry' and Others [2003] 1 SLR 471, CA (refd)

The Nordic Freedom [2001] 1 SLR 232, HC (refd)

A *The 'Pacific Vigorous' [2006] SGHC 103* [2006] 3 SLR 374, HC (refd)
Trengganu Forest Products Sdn Bhd v Cosco Container Lines Company Ltd & Anor [2009] 7 MLJ 781, HC (refd)
Wait and James v Midland Bank Ltd (1926) 24 LI (Rep) 313 (refd)

B **Legislation referred to**
Bills of Lading Act 1855 [UK] s 1
Contracts Act 1950 s 104
Sale of Goods Act 1893 [UK] s 16
Sale of Goods Act 1957 ss 18, 19, 23, 23(1), (2), 25(1), (2), (3)

C *Philip Teoh (Philip & Co) for the plaintiff.*
Sitpah Selvaratnam (Tommy Thomas) for the defendant.

Nallini Pathmanathan J:

D INTRODUCTION

[1] This consolidated action comprises three suits arising out of similar circumstances and which bear identical claims. The three suits were
E consolidated vide order of court dated 15 February 2005. As the facts and issues in the three suits relating to the carriage of crude palm oil are similar, the circumstances surrounding the carriage of crude palm oil on the vessel known as Istana VI are utilised to consider the common issues ('the Istana action'). The decision in respect of the Istana action is therefore binding on the other two
F suits.

[2] The plaintiff in the three suits is Lushing Traders Pte Ltd ('the plaintiff'). The facts relating to the Istana action disclose that the plaintiff had purchased three parcels of crude palm oil in bulk, totaling 1,998.518 metric tons from an
G Indonesian supplier and the original seller, one Kantor Pemasaran Bersama ('KPB') on FOB ('free on board') terms. This quantity of crude palm oil was loaded on to the vessel, Istana VI for purposes of carriage and delivery of the said cargo. The vessel is owned by the defendant, Taruna Kencana Cipta ('the defendant') and at the material time had entered into a charterparty agreement
H with one Summerwind Trading Pte Ltd and/or its nominee.

[3] The plaintiff's complaint against the defendant shipowner is two fold. It complains that pursuant to bills of lading issued by the defendant and in the plaintiff's possession as lawful endorsee, as well as shipping instructions issued
I by the plaintiff to the defendant, the cargo was to be carried to, and discharged at Yantai, China. However the cargo was not discharged at Yantai, China but at Port Klang, Malaysia. The plaintiff's further complaint is that the defendant discharged the cargo to a third party, one Mewah Oils Sdn Bhd ('the receivers') without production of the original bills of lading, on the instructions of, and by

reason of the issuance of a letter of indemnity by the charterer, Summerwind. Claiming as owners of the cargo of crude palm oil, the plaintiff commenced these suits against the defendant for delivery up of the cargo or alternatively to recover damages for the loss of the cargo.

[4] The plaintiff founds its claim variously and separately:

(a) in contract as the lawful endorsee of three bills of lading comprising the consignment of 1,998.518 metric tons of crude palm oil comprising its entire cargo, under s 1 of the United Kingdom Bills of Lading Act 1855;

(b) in tort as the owner of the cargo, alleging conversion;

(c) in tort for misdelivery or wrongful delivery of the cargo, given that the plaintiff as the holder of the bills of lading enjoys rights of possession to the cargo; and

(d) in bailment.

[5] The defendant in response to the plaintiff's claim denies liability for the loss of cargo contending that no liability rests on the defendant for the plaintiff's loss because:

(a) It did not deliver the said cargo comprising 1,998.518 metric tons of crude palm oil to the receiver Mewah Oils Sdn Bhd as alleged, but discharged the said cargo into bonded shore tanks in accordance with the instructions of the charterer Summerwind as well as the terms of the charterparty;

(b) The plaintiff intended, consented and acquiesced to such discharge into Mewah's bonded shore tanks in Port Klang, and accordingly the defendant's conduct was not improper;

(c) The loss sustained by the plaintiff was caused by intervening acts of third parties and omissions of the plaintiff which were outside the control of the defendant;

(d) The plaintiff has no right of action in relation to the cargo, for want of title to sue. In other words, the defendant contends that the property in the 1,998.518 metric tons of crude palm oil had not vested in, or passed to the plaintiff at the time of the alleged conversion and therefore the plaintiff has no title to sue. In like manner it is contended that property in the said cargo did not pass to the plaintiff upon, or by reason of the endorsement on the three bills of lading as required by s 1 of the Bills of Lading Act 1855 ('BOLA') and therefore the plaintiff is also precluded from seeking any remedy under that section.

[6] The trial of this action took three days with two witnesses each for the plaintiff and the defendant.

THE SALIENT FACTS

[7] In January and October 2003, One Quartset Investments Ltd ('Quartset') and Compact International Ltd ('Compact') entered into two separate contracts with the plaintiff for the sale and purchase of two parcels of crude palm oil in bulk, each parcel comprising 1,000 metric tons, to be supplied directly from Kantor Pemasaran Bersama ('KPB') of Indonesia. Quartset and Compact had initially contracted to purchase these parcels of oil themselves from KPB, but were unable to take delivery and so contracted with the plaintiff to take up these parcels directly from KPB. The sales contracts were on FOB (free on board) terms (see exhs P4 and P6). Payment was to be made directly to KPB vide its bankers, Bank Mandiri Medan either by irrevocable letter of credit for the full value of the oil prior to arrival of the performing vessel or by telegraphic transfer or by cash in US currency.

[8] Pursuant to these sale contracts, the plaintiff on 16 October 2003 instructed its bankers, American Express Bank Ltd vide two separate facsimiles to remit the sums of USD389,250 (exh P7) and USD347,500 respectively to Bank Mandiri Medan for the account of KPB, the supplier or original seller of the cargo. This comprised the purchase price for the two parcels of crude palm oil of 1,000 metric tons each. Vide debit advice statements dated 20 October 2003 (exh P8) and 23 October 2003, American Express Bank advised the plaintiff that the two payment amounts had been debited from the plaintiff's account. The plaintiff contends that these documents evidence the fact that by 23 October the purchase price for the 2,000 metric tons of crude palm oil had been debited from the plaintiff's account in favour of the supplier and original seller, KPB.

[9] On 17 October 2003 the plaintiff issued shipping instructions to the defendant for the purposes of issuance of bills of lading. In their shipping instructions, the plaintiff specified that the shipper was KPB in Medan, the vessel — the Istana VI, the quantity of crude palm oil in bulk being 2000 metric tons. The port of loading was specified as Dumai, Indonesia and the port of discharge as Yantai, China. The consignee was 'To order' while the freight specified as payable was 'As per charter party'. The party to be notified was specified as China Grains, Oils and Feedstuffs Co Ltd of Beijing. The bills of lading were to be split into two bills of lading of 500 metric tons each and one of 1,000 metric tons, thereby comprising three in total.

[10] In the interim, the defendant had contracted with Summerwind via Summerwind's brokers Omega Chartering Pte Ltd, for a charter of the vessel

Istana VI. A charterparty agreement dated 18 September 2003 was entered into between the defendant and Summerwind Trading Pte Ltd and/or its nominee. Although the charterparty agreement is dated 18 September 2003 ('the charterparty agreement') there is correspondence between the charterer on behalf of Summerwind and the defendant suggesting that as of 23 October 2003 the said charterparty agreement had not been executed. The terms of the charterparty agreement provide, inter alia, that the port of loading is either Belawan or Dumai and the discharge port as Pasir Gudang or Port Klang. For the purposes of this action, it is the second voyage from Dumai Port to Port Klang that is relevant. The freight rate was USD35,000 per voyage with specified demurrage charges. At the outset the charterparty agreement provides as follows:

> ... The Vessel shall receive from the Charterer or supplier at the port or ports of loading, or so near thereto as she may safely get, always afloat, the cargo described in Part 1, for delivery as ordered on signing bills of lading to the port or ports of discharge, or so near thereto as she may safely get always afloat; and there discharge the cargo; ...

[11] From the foregoing it is apparent that Summerwind had contracted with the defendant for a contract of carriage by sea, paying freight for the carriage of up to 4,000 tons of crude palm loaded at Belawan or Dumai for discharge at Pasir Gudang or Port Kelang. The plaintiff in the meantime had issued shipping instructions to the defendant for the purposes of procuring bills of lading for the delivery of a total of 2,000 tons of crude palm oil, split into three contracts, for loading at Dumai Port and discharge at Yantai, China.

[12] On 19 October, Summerwind's brokers, Omega Chartering Pte Ltd sent an email to the defendant stating, inter alia, as follows:

> ... summerwind is facing a problem and requesting owners for help. As you well know, vessel has waited unnecessary for cargo readiness and chrtrs has suffered heavily for this.
>
> Chrtr are finding it difficult to buy cargo as cargo availability is short however in order to fulfill their contractual obligations to you, they have converted some of their cargoes bought for china to this shipment on the Istana VI.
>
> However due to time constraint, they are unable to amend their l/c on time. As such the local b/ls being issued at Duami to the shippers will have to state the discharging port as Yantai. As per standard shipping procedures, chartrs will provide owners with a L.O.I, for a change of destination.
>
> When the local b/ls are being return to the chartrs, chartrs will surrender the full set of local b/ls back to the owners in exchange for fresh new sets of b/ls stating the actual dischg port i.e. pasir gudang or port klang. Chrtr advise that they cannot afford to incur anymore unnecessary delays to the vessel and would greatly appreciate it if owners can assist them on this matter, just this time.

A Await owner's agreement.

[13] The foregoing email is of significance as it throws light on several matters. It explains that the charterers Summerwind were experiencing difficulties in procuring cargo for the voyages it had contracted to be performed under the charterparty agreement with the defendant. As such Summerwind 'converted' cargo purchased for shipment to China to the shipment on board the Istana VI instead. In other words, Summerwind had intended to purchase the plaintiff's cargo of crude palm oil bound for China, and utilise it for shipment to Port Klang instead of Yantai China to fulfill certain contractual obligations.

[14] The email goes on to specify that as Summerwind is 'unable to amend their l/c on time', it required the defendant's assistance to stipulate on the bill of lading that the discharge port was Yantai, China eventhough the parties, ie Summerwind and the defendant were aware that the destination under the charterparty agreement was Port Kelang, Malaysia. The charterers undertook to provide the defendant with a letter of indemnity to 'cover' the change in destination from China to Malaysia.

[15] The charterers' brokers further advised that when the local bills of lading were received by them, they would surrender these bills of lading to the owners and replace them with fresh new sets stipulating the port of discharge as Port Kelang.

[16] It is apparent from the foregoing that:

(a) The defendant was, at all times performing a voyage from Dumai to Port Klang, and not China;

(b) They had received shipping instructions from the plaintiff for carriage of cargo to Yantai, China from Dumai;

(c) The defendants were made aware that Summerwind intended to convert some of the cargo intended for China to cargo for the charterparty voyage to Port Klang;

(d) In order not to frustrate or hinder Summerwind's payment obligations for such cargo vide letter of credit with its financiers, Summerwind sought the defendant's assistance to stipulate on the bills of lading that the destination of the cargo was China, although it was apparent that the goods were going to be sent to Port Klang;

(e) In order to meet the defendant's concerns about the 'apparent deviation', Summerwind was prepared to provide a letter of indemnity authorising such deviation and meeting the consequences thereof; and

(f) As for the bills of lading, Summerwind undertook to replace the original bills of lading with fresh sets stipulating the actual destination and advising the owners.

[17] On 21 October Captain Bachlem E Kaliwuge authorised the defendant to '... enter into and do all things necessary for the execution and signing ...' on his behalf of bills of lading for the carriage of goods on Istana VI under his command.

[18] On 23 October loading of the crude palm oil via pipes into the ship's storage tanks commenced. Loading was completed by approximately 4.15pm on 23 October. Apart from the approximately 2,000 metric tons shipped by KPB pursuant to the FOB sale contract between it and the plaintiff, the vessel also carried another parcel of oil shipped by another seller Ivomas comprising a further 2,000 metric tons. Only these two shippers' consignments were carried on board the Istana VI during this voyage from Dumai to Port Klang. The cargo shipped by KPB and purchased by the plaintiff was loaded and kept separately in the ship's tanks located at 1 Port, 1 Starboard, 3 Port and 3 Starboard. In other words the oil shipped under the plaintiff's sales contract with KPB for 2,000 metric tons of crude palm oil in bulk was stored separately from that shipped by Ivomas. The parcels of oil from the two shippers was not co-mingled.

[19] On the same day, ie 23 October three bills of lading were issued in respect of the 2,000 metric tons of crude palm oil shipped by KPB under the sales contract with the plaintiff, namely DUMYCH/02, DUMYCH/03 and DUMYCH/04. The three bills reflected the plaintiff's instructions to split the entire consignment into quantities comprising two parcels of 500 metric tons and one parcel of 1,000 metric tons. The entire bulk of 2,000 metric tons comprising the cargo purchased by the plaintiff was therefore all stored separately, although not split or divided into containers of precisely 500 metric tons and 1,000 metric tons. The three bills of lading are similar in form. They each specify that the shipper is KPB, the port of loading Dumai, the port of discharge, Yantai, China and the party to be notified as China Grains Oils and Feedstuffs Co Ltd of Beijing. The bills specify that the cargo is crude palm oil in bulk. No consignee is specified and the bills of lading are made 'To Order', meaning to the order of the shipper, KPB. The payment of freight is stated to be in accordance with the charterparty agreement of 18 September 2003 between the defendant and Summerwind's nominee, one Kearns Pte Ltd as charterer. The bill of lading further specifies that '... all the terms whatsoever of the said charter except the rate and payment of freight specified therein apply to and govern the rights of the parties concerned in this shipment'.

[20] An email attaching these drafts of the bills of lading were sent by the defendant to, inter alia, the plaintiff on the same day. However there is no evidence that the charterparty agreement or its terms were made available to the plaintiff.

[21] On the same day, ie 23 October, the charterers, Summerwind nominated Kearnes Pte Ltd as their nominee and instructed their brokers to advise the defendant accordingly vide an addendum. However they expressly advised that they as charterers remained fully responsible for the performance of the charter party. In addition to the bills of lading thus instructed to be issued specifying the destination as Yantai, China, Summerwind also issued a document termed a global bill of lading dated 23 October 2003 which specified the loading port as Dumai and the discharge port as Port Klang. The party to be notified was Mewah Oils Sdn Bhd, the receiver that eventually took possession of the oil carried on board the Istana VI. In this global bill of lading Summerwind stated and represented as follows to the defendant:

> ... We the undersigned request that the master of the above vessel deliver the cargo consisting of crude palm oil in bulk and 3998.421 mt and shipped by Kantor Pemasaran Bersama and Pt. Ivo Mas Tunngal at the Port of Dumai, Indonesia on 23rd October 2003 to the Port of Yantai China notwithstanding the original bills of lading having been issued, we Summerwind Trading Pte. Ltd. request the vessel to deviate her discharging port of calling for delivery at the port of Port Klang (West) Malaysia and consigned to 'To Order' and 'Notify Mewah Oils Sdn. Bhd.' and without prior production of the original bills of lading.

[22] In the same global bill of lading Summerwind provided the defendant with an indemnity in return for compliance with its directions above. This included the following:

> ... In consideration of your complying with our above request, we hereby agree as follows:
>
> 1. To indemnify you, your servants and agents and to hold all of you harmless in respect of any liability loss, damage or expense of whatsoever nature which you may sustain by reason fo the ship proceeding and giving delivering of the cargo in accordance with our request.
> 2. In the event of any proceedings being commenced against you or any of your servants or agents in connection with the ship proceeding and giving delivery of the cargo as aforesaid, to provide you or them on demand with sufficient funds to defend the same.
>
> ...
>
> 3. If the place at which we have asked you to make delivery is a bulk liquid or gas terminal or facility or another ship, lighter or barge then delivery to such terminal, facility, ship, fighter or barge shall be deemed to be delivery to the party to whom we have requested you to make such delivery.

4. As soon as all original bills of lading for the above cargo shall have come into our possession, to deliver the same to you or otherwise to cause all original bills of lading to be delivered to you whereupon our liability hereunder shall cease ...

[23] DW1, Dhiyana Triadi who testified for the shipowner, was cross-examined on the documents above as well as the email relating to the request by Summerwind that the defendant state a destination other than that which was planned and agreed between the parties to 'assist' Summerwind. He testified as follows:

Q: Refer to page 26. Can you explain to us what is the purpose of this e-mail? (the e-mail of 19 October 2003)

A: Pak Wino is one of the employees of the Defendant based in the Jakarta office. The e-mail mentions that the charterers are finding difficulty to buy cargo. And they have converted some of the cargo bought for China for this shipment.

Q: What do you understand by that?

A: Converted means change. Then they say that the discharging port as Yantai and then as per standard shipping procedure the charterers will provide the owners with change of destination.

Q: Change of discharging port — from which port to which port?

A: It is not stated. Only states that the discharging port in the b/l to be changed to Yantai.

Q: What is the real port of discharge?

A: Port Klang or Pasir Gudang.

Q: You mean Yantai is a false discharging port?

A: I can't say that. It is just to be mentioned in the b/l.

Q: So this e-mail of 19 October 2003 you agree that neither Summerwind nor the Defendant had any intention to go to Yantai?

A: Yes.

Q: Do you agree that following this the Defendant agreed to state a false port of discharge?

A: We just follow the instructions of the charterers to make the b/l.

Q: I put it to you that in agreeing with this request, the Defendant did not care whether the b/l holder would suffer loss.

A: I do not agree.

Q: I put it to you that the Defendant could easily have refused Summerwind's request?

A: We don't have reason for that. Not necessary to refuse.

Q: Do you agree that the proper shipping practice is that the Defendant must state the actual destination on the b/l?

A: No.

Q: Are you saying that the Defendant can state a false destination?

A: The b/l is according to the charterparty It states that shipment is carried pursuant to the terms of the charterparty.

Q: Refer to page 4. It says Pasir Gudang. In accordance with proper shipping practice the owner should only issue a b/l in accordance with the real port of discharge?

A: There is an LOI (Letter of Indemnity) from the charterers that they require b/l to be issued to Yantai, China.

Q: So the Defendant was heavily reliant on this LOI in complying with this request?

A: Yes.

[24] It follows from the foregoing and the e-mail dated 19 October that the defendant understood and had agreed to Summerwind's proposal:

(a) To issue local bills of lading to the shipper, KPB (which would be passed on to the lawful endorsees in due course) specifying the destination of KPB's cargo as Yantai, China when at all times the voyage to be undertaken was to Port Klang, Malaysia. In short the statements and representations on the bills of lading relating to the destination of the cargo were false;

(b) To deviate from the discharge port stated on the bills of lading to be Yantai, China, to Port Klang, Malaysia; and

(c) To notify Mewah Oils Sdn Bhd without requiring the production of the original bills of lading, in other words to discharge the cargo without the production of the original bills of lading.

[25] The vessel sailed off from Dumai on the morning of 24 October at 3.48am and arrived at Port Klang at around 3pm on the same day. DW1 issued an e-mail to this effect stating that the party to be notified with regards to the cargo was Mewah Oils Sdn Bhd. He further specified, on behalf of the defendant, that as the charterers, Summerwind had issued a letter of indemnity, discharge was to be effected upon the arrival of the vessel at Port Klang without production of the original bills of lading.

[26] Accordingly on arrival at Port Klang the defendant issued a notice of readiness to Mewah Oils Sdn Bhd at 15.06pm which was accepted at 20.00 hrs (or 8pm) the same day. Discharge commenced immediately thereafter at 20.10 hrs (or 8.10pm) and was completed on 26 October at 8am. The surveyors

confirmed that the cargo was discharged in good order and condition on that date. It is apparent from the foregoing that discharge to Mewah Oils Sdn Bhd had proceeded without production of the original bills of lading but against the letter of indemnity furnished by Summerwind the charterer.

[27] In the meantime, it will be recalled that the plaintiff's bankers advised them that their account had been debited for the purchase price of the cargo on 20 and 23 October. The plaintiff's second witness, Burhanuddin, the managing director of the plaintiff ('PW2') gave evidence that on 24 October the three original bills of lading were collected from the offices of KPB having been endorsed on the reverse side by KPB. A second subsequent endorsement was made by the plaintiff. PW2 gave further evidence that the plaintiff was not forwarded or given a copy of the charterparty agreement between the defendant and Kearns when the original bills of lading were made available to them. In other words, the plaintiff did not have sight nor possession of the charterparty agreement.

[28] PW2 testified that the plaintiff had contracted with Summerwind the charterer to sell its cargo, ie the 1,998.518 metric tons of crude palm oil to Yantai, China where the party to be notified was China Grains, Oils and Foodstuffs Co Ltd, Summerwind's purchaser. Summerwind, the charterer was supposed to pay the plaintiff by way of a letter of credit but this did not materialise. The transaction between the plaintiff and Summerwind was based on payment by way of a letter of credit. The plaintiff duly presented the relevant documents to the bankers for receipt of payment under the letter of credit. The plaintiff admitted through PW2 that such presentation was late. Amendments were sought in respect of the letter of credit. In any event, payment under the letter of credit was refused. Subsequently Summerwind also confirmed that it was unable to make payment for the said cargo. As Summerwind did not pay the plaintiff for the said cargo, the plaintiff retained the bills of lading in its possession as the unpaid seller/vendor of the said cargo vis a vis Summerwind.

[29] PW2 further testified that when the plaintiff received notification that Summerwind couldn't pay for the cargo, they then tried to locate the cargo as they retained the original bills of lading. They finally contacted the defendant shipowner on 5 December 2003. PW2 wrote to the defendant asking about the cargo shipped on the Istana VI from Dumai to Yantai, China. PW2 stated that the plaintiff was aware that the cargo had been released in the discharging port but advised that as of that date, the original bills of lading were still with the relevant letter of credit documents in the issuing bank. The plaintiff sought clarification as to which documents were utilised to release the cargo to the receivers. Receiving no response, the plaintiff wrote again on 10 December 2003 with a statement from KPB stipulating that the plaintiff was the lawful

owner of the cargo by reason of full payment of purchase price and endorsement of the bills of lading in the plaintiff's favour. In its second letter, it appears that the plaintiff still harboured the misconception that the cargo had been discharged in Yantai, China and asked for the basis on which release of the cargo had been effected.

[30] The plaintiff still did not receive a response and on 16 December wrote to the defendant asking about the location of the cargo and into whose tank it had been discharged, who had instructed the discharge and the details of the receiver. The plaintiff further requested that the defendant not release the cargo to any party.

[31] The defendant responded on 18 December stating that:

(a) There was never a contract to perform a voyage from Indonesia to Yantai and that the bills of lading in the plaintiff's possession were null and void;

(b) The cargo was not released under any 'Yantai' bill of lading as such a bill of lading was void; and

(c) There was no 'switching' of bills of lading.

[32] The defendant maintained that it had no knowledge of the plaintiff's interest in the matter until the plaintiff's letter. The defendant directed the plaintiff to seek clarification from Summerwind, the charterer.

[33] On 31 December the defendant wrote to the plaintiff on a without prejudice basis claiming that the discharge port agents confirmed that the entire cargo of crude palm oil had been delivered to Mewah Oils Sdn Bhd.

[34] The plaintiff wrote again to the defendant on 2 January 2004 seeking further clarification and documentation. Summerwind responded vide a letter dated 6 January 2004 addressed to Mewah Oils Industries Sdn Bhd and copied the plaintiff. Summerwind confirmed that pursuant to the letter of indemnity dated 23 October 2003 issued by them to the vessel operator, the plaintiff's cargo was discharged into Mewah Oils storage tanks in Port Klang. Summerwind further confirmed that such discharge was ordered in their capacity as charterers only and not as owners of the cargo. They sought a return or release of the cargo from Mewah Oils confirming that it belonged to the plaintiff and that the original bills of lading remained in the plaintiff's possession and control. This then comprises the chronology of salient facts relating to the consolidated suits. Albeit trite, it must be said at the outset that the burden lies at all times on the plaintiff to prove its claim. From the foregoing factual matrix, it is evident that the plaintiff has shown on the relatively undisputed evidence before this court that the defendant did in fact

discharge the cargo to a third party receiver, not in Yantai, China but at Port Klang, Malaysia. Additionally it is not in dispute that such discharge was effected without production of the original bills of lading. The original bills of lading were, at the time of trial, still in the possession of the plaintiff. The defendant, however, as stated above maintains that it has no liability to the plaintiff for such discharge because:

(a) There was no delivery of the cargo to the receiver Mewah Oils Sdn Bhd, merely discharge into bonded shore tanks at Port Klang;

(b) The defendant did no wrong in so discharging the cargo as the plaintiff acquiesced and consented to such discharge in Port Klang;

(c) The defendant did not cause the plaintiff's loss because the cargo was taken into Mewah Oil's possession as a consequence of intervening and unrelated acts by the receiver; and

(d) The plaintiff has no title to sue, albeit in tort or under the Bills of Lading Act 1855.

ISSUES

[35] Given the foregoing, the issues that arise for consideration are as follows:

Whether or not the plaintiff possesses or enjoys title so as to bring these suits against the defendant:

(i) in contract as holder/endorsee of the three bills of lading pursuant to s 1 of the Bills of Lading Act 1855 ('BOLA'); and

(ii) In tort for conversion or for negligence and breach of duty.

The plaintiff maintains that at all material times it was the owner of the cargo, enjoying right of title, ownership and the right to immediate possession of the cargo. The defendant contends that the property in the cargo did not pass to the plaintiff at any time between 24 October and 26 October when the cargo was discharged in Port Klang. As such the plaintiff was not the owner of the cargo, at the time of discharge to the receiver, Mewah Oils Sdn Bhd between 24 to 26 October 2003.

With regards to the cause of action in tort, framed in conversion and in misdelivery, the defendant contends that as the property in the cargo did not pass to the plaintiff at any time between 24 and 26 October 2003, ie at the time of discharge, the plaintiff was not the owner of the cargo at that time and therefore had no right to claim either title or an entitlement to immediate possession of the said cargo. Accordingly a cause of action in tort cannot also be maintained.

In so far as the claim in contract is concerned, the defendant maintains that as the property in the cargo did not pass to the plaintiff '... upon or by reason of the endorsement on the bill of lading, the plaintiff is not entitled to sue under s 1 of the Bills of Lading Act 1855.

Given the foregoing, the issue for consideration is whether or not the plaintiff have title to sue in tort and under the Bills of Lading Act 1855.

(a) The second issue for consideration is whether or not the discharge of the cargo into bonded shore tanks belonging to Mewah Oils in Port Klang amounted to delivery or not. The plaintiff contends that the defendant's act in discharging the cargo as above amounts to delivery while the defendant maintains that it does not. The defendant contends that no liability rests on it for the loss of the plaintiff's cargo as it did not deliver the said cargo or issue delivery orders enabling any party to take delivery of the cargo without the original bills of lading. In this context the defendant stipulates that it merely discharged the cargo of crude palm oil, but did not deliver the same to Mewah Oils. A distinction is drawn between discharge and delivery.

(b) The third issue for consideration is whether or not the plaintiff intended, consented and authorised or acquiesced to the discharge of the cargo into Mewah Oils' bonded shore tanks. The plaintiff maintains that it had no knowledge of, and therefore could not have so authorised, or consented to such discharge. The defendant contends that the discharge of the cargo into bonded shore tanks was proper, in accordance with the instructions of the charterer, Summerwind and more significantly, carried out with the plaintiff's knowledge, consent and/or authorisation.

(c) The fourth issue for consideration is whether the loss suffered by the plaintiff was caused by the defendant. The plaintiff maintains that as a consequence of the 'misdelivery' it lost its cargo and seeks compensation for the same. The defendant maintains however that the actual loss suffered by the plaintiff arose as a consequence of intervening acts on the part of third parties, namely Mewah Oils in procuring possession of the cargo from the bonded shore tanks, as well as omissions of the plaintiff all of which were outside the control of the defendant. Accordingly the defendant maintains that it has no liability for the plaintiff's loss.

[36] Each of these issues will be considered in turn.

The plaintiff has no title to sue or no right of action against the defendant:

(a) In tort for conversion or for negligence and breach of duty; and

(b) In contract as holder/endorsee of the three bills of lading pursuant to s 1 of the Bills of Lading Act 1855 ('BOLA').

[37] First the issue of the entitlement of the plaintiff to sue in tort for conversion and misdelivery or delivery in breach of their duty falls for consideration. In order to bring such a cause of action, the burden lies on the plaintiff to show that at the material time, namely between 24 and 26 October, property in the cargo had passed to it from KPB such that it was the owner. If property passed after those dates then it would follow that the plaintiff was not the owner of the cargo at the material time and would therefore have no entitlement to sue in tort. In *Leigh & Sillavan Ltd v Aliakmon Shipping Co Ltd The Aliakmon* [1986] 2 All ER 145 the House of Lords had to consider whether buyers, whom it was agreed did not have title to steel comprising cargo on board a vessel, were nevertheless entitled to sue the ship owners in negligence for damage caused by reason of the steel having been badly stowed on board the ship owners' vessel during a voyage from Korea to the United Kingdom. Lord Brandon held as follows:

> ... My Lords, there is a long line of authority for a principle of law that, in order to enable a person to claim in negligence for loss caused to him by reason of loss of or damage to property, he must have had either the legal ownership of or a possessory title to the property concerned at the time when the loss or damage occurred, and it is not enough for him to have only had contractual rights in relation to such property which have been adversely affected by the loss of or damage to it. The line of authority to which I have referred includes the following cases: *Cattle v Stockton Waterworks Co* (1875) LR 10 QB 453, (contractor doing work on another's land unable to recover from a waterworks company loss suffered by him by reason of that company's want of care in causing or permitting water to leak from a water pipe laid and owned by it on the land concerned); *Simpson & Co v Thomson* (1877) 3 App Cas 279 (insurers of two ships A and B, both owned by C, unable to recover from C loss caused to them by want of care in the navigation of ship A in consequence of which she collided with and damaged ship?
>
> B): ...
>
> None of these cases concerns a claim by cif or c & f buyers of goods to recover from the owners of the ship in which the goods are carried loss suffered by reason of want of care in the carriage of the goods resulting in their being lost or damaged at a time when the risk in the goods, but not yet the legal property in them has passed to such buyers. The question whether such a claim would lie, however came up for decision in *Margarine Union GmbH v Cambay Prince Steamship Co Ltd, The Wear Breeze* [1967] 3 All ER 775; [1969] 1 QB 219. In that case cif buyers had accepted four delivery orders in respect of as yet undivided portions of a cargo of copra in bulk shipped under two bills of lading. It was common ground that by doing so, they did not acquire either the legal property in or a possessory title to, the portions of copra concerned; they only acquired the legal property later when four portions each of 500 tons were separated from the bulk on or shortly after discharge in Hamburg. The copra having been damaged by want of care by the shipowners' servants or agents in not properly fumigating the holds of the carrying ship before loading, the question arose whether the buyers were entitled to recover from the shipowners in tort for negligence the loss which they had suffered by reason of the copra having

A been so damaged. Roskill J held that they were not, founding his decision largely on the principle of law established by the line of authority to which I have referred ...

[38] It is therefore established beyond dispute that without rights of ownership or property being vested in the plaintiff as owners of the cargo, the plaintiff would not be entitled to bring or succeed in its action framed in tort against the defendant. The matter that falls for consideration in the instant case therefore is whether and when property in the cargo, ie the 1988.518 metric tons of crude palm oil passed from the shipper KPB to the plaintiff. The three contracts of sale between the plaintiff and the seller were FOB or 'free on board' contracts. FOB contracts vary greatly in terms of the precise obligations and duties of the buyer and seller. This is determined in each case by the individual contract between the buyer and seller and the categories are accordingly infinitely variable. A 'free on board' contract generally means that it is the original seller's obligation, ie KPB's obligation in the instant case, to place the cargo, namely the 1,998.98 metric tons of crude palm oil in bulk on board the carrier, namely the Istana VI in this case, which was nominated by the buyer, ie the plaintiff and chartered by the charterer, Summerwind, for transmission of the cargo. The seller therefore at the moment of placing the cargo on board the vessel becomes a party to the contract of carriage. This is evidenced by the bill of lading which was made out to order of the shipper, KPB. The bill of lading of 23 October was then endorsed and made available to the plaintiff as lawful endorsee on 24 October. It is apparent that the relationship between the seller and the buyer is separate from that which arises between these parties and the carrier.

[39] The primary issue for consideration here however is if and when property in the cargo passed from the original seller, KPB to the plaintiff. This is not governed solely by the fob terms but by the provisions of the Sale of Goods Act 1957 ('SOGA'). SOGA deals, inter alia, with the transfer of property as between seller and buyer in chapter III.

[40] Section 18 provides that '... where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained'. Once ascertainment has taken place, the passing of the property depends on the intention of the parties which is to be ascertained from the terms of the contract and the circumstances of the case (s 19). In the instant case the contract for the sale of the total of 1,988.518 metric tons of crude palm oil in bulk comprises a contract for the sale of unascertained goods. Section 23 is relevant in this context as it deals with the sale of unascertained goods and appropriation. It provides that '(1) *Where there is a contract for the sale of unascertained* or future *goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract*, either by the seller with the assent of the buyer or by the buyer with the

assent of the seller, *the property in the goods thereupon passes to the buyer*'. (Emphasis added.) It is therefore necessary to ascertain whether the 1,998.518 metric tons of crude palm oil corresponding to the sale contracts between the seller, KPB and the buyer, the plaintiff, was, in a deliverable state unconditionally appropriated to the contract.

[41] It has been set out in the chronology of salient facts that in this case there were three FOB contracts of sale executed between Quartset and the plaintiff and Compact and the plaintiff for the purchase by the plaintiff in total of the said 1,998.518 tons of crude palm oil. The contracts with Quartset and Compact came about because these entities were unable to take up delivery of these parcels of oil which they had entered into with KPB. The plaintiff took over the sales contracts from these entities, such that supply was directly from KPB to the plaintiff and payment was to be made directly to KPB. In effect therefore the whole of the 1,998.518 metric tons was sold by one seller, KPB to one purchaser, namely the plaintiff under three FOB contracts of sale. It will be recalled that the only other cargo carried on the defendant's vessel was the parcel of oil shipped by Ivomas. The total cargo carried on Istana VI on the voyage from Dumai to Port Klang comprised four tons of crude palm oil in bulk. However it is significant that the 1,998.518 metric tons of crude palm oil which comprised the cargo under the three contracts of sale between KPB and the plaintiff was stored separately from, and not co-mingled with the other 2,000 odd metric tons belonging to Ivomas. In other words, the 1,998.518 metric tons comprising the subject matter of the three bills of lading DUMYCH02, DUMYCH03 and DUMYCH04 was stored separately as evidenced by the annotation on the individual bills of lading (The bills of lading denote storage at particular tanks on board the vessel, namely 1P, 1S, 3P, 3S). From the foregoing it may be concluded that the cargo of 1,998.518 metric tons of crude palm oil could be identified specifically on board the vessel as the cargo of the plaintiff. The cargo could therefore be ascertained, in that that quantity of oil could be identified as being deliverable under the three bills of lading, albeit collectively.

[42] The next issue for consideration, now that it has been determined that the cargo could be identified and was ascertained, is whether such cargo was appropriated to the contract as required under s 23 so that the property in the goods passed to the buyer, ie from KPB to the plaintiff. In this context the defendant contends that as the crude palm oil or cargo under three bills of lading was stored in bulk on board the vessel without being segregated to denote the quantity reflected in each bill of lading, there was no appropriation of the goods to the individual contracts. In other words, even though the goods or cargo under all three bills of lading was ascertained, there was no appropriation to each bill of lading, which precludes or prohibits the property in the goods from passing to the buyer as envisaged by s 23(1).

[43] It is not in dispute that there was no physical separation of the crude palm oil in the storage tanks of the vessel, as between the three contracts evidenced by the bills of lading. The crude palm oil was not divided or segregated physically into containers in accordance with each of the bills of lading. Does that prevent the property from passing to the buyer, namely the plaintiff, notwithstanding ascertainment and delivery onto the carrier, until some subsequent point in time? Does the lack of physical segregation between the individual bills of lading preclude or prohibit ascertainment and appropriation to the contract?

[44] This issue was closely examined in *Karlshamns Olje Fabriker v Eastport Navigation Corporation, The Elafi ('the Elafi')* [1981] 2 Lloyds LR 679 by Mustill J then in the High Court. His Lordship considered and adopted the reasoning of Roche J in the case of *Wait and James v Midland Bank Ltd* (1926) 24 LI (Rep) 313 where there was a dispute between the claimants, who were unpaid vendors of grain to a company called Redlers, and a bank, to whom part of the grain was pledged as security for an overdraft. The question was whether in the circumstances of the case, property had passed to the company, Redlers, so that they could confer a proprietary interest on the bank. The claimants were owners of a shipload of wheat which was delivered into a warehouse. By three contracts the claimants sold part of the shipload to Redlers giving them delivery orders, against which Redlers took delivery of part and left the remainder in the warehouse. As time went by, the claimants made sales of the cargo to other purchasers until there were no goods left in the warehouse save for that left behind by Redlers. Redlers then pledged the goods to the bank. On the application of the warehouse the rights of the claimants and the bank were decided by interpleader proceedings. The claimants argued that under the (then) English Sale of Goods Act 1893, property in the goods sold from bulk did not pass until the goods had been separated from the bulk and ascertained; and since the goods had never been appropriated as between the three contracts the property could not pass, eventhough the bank was pledge of the entire quantity remaining. All that the company, Redlers could transfer to the bank was the right to get the cargo weighed out of the warehouse. The bank contended that as soon as all the goods that the claimants had in the warehouse had been disposed of, leaving the amount sold to Redlers, that amount became ascertained by the process of exhaustion and the property passed to Redlers who were in a position to pass it on to the bank. The court found in favour of the bank, stating that on the facts of the case, the goods had become ascertained by a process of exhaustion. In so finding the court further held that while it was true that there had been no differentiation of the goods between the different contracts, this did not mean that there had been no sufficient ascertainment for the purposes of their Act which is pari materia with s 18 of the SOGA. It was held that as the contracts for the sale of unascertained goods were to one buyer, it was sufficient for the purposes of s 16 of the English Act that it could be ascertained what goods were covered by those contracts. Although the goods

had not been differentiated as between the different contracts, this did not preclude property from passing, meaning that not only was there ascertainment but also appropriation to the contract.

[45] In considering this reasoning and adopting the same, Mustill J dealt with the reasoning underlying the Sale of Goods Act 1893 which is similar, if not identical to the Malaysian Sale of Goods Act 1957. He held as follows:

> ... The passing of property is concerned with the creation of rights in rem, which the purchaser can assert, not only against the vendor, but against the world at large, and which he can alienate in such a way as to create similar rights in a transferee. Where there are multiple contracts of sale in the hands of different buyers, in relation to an undivided bulk, there are only two possible solutions. First to hold that the buyers take as joint owners in undivided shares. English law has rejected this solution. The only alternative is to hold that the property does not pass until the goods are not only physically separated but separated in a way which enables an individual buyer to say that a particular portion has become his property under his contract for sale; for until then, to adopt the words of Baron Bayley in *Gillett v Hill and Another* (1834) 2 Cromp & M 530 at p 545 no one can say which part of the whole quantity the seller has agreed to deliver. *There is however, no need to impose this solution on a case where there are parallel contracts between the parties together comprising the whole of the bulk. Here it is known which part of the whole the seller has agreed to deliver, namely all of the parts. I am unable to envisage a situation in which it would make the least practical difference whether or not the purchase of an entire cargo from the same seller under a series of contracts for homogeneous goods is able to identify which ton or bag of the whole relates to which contract. So far as the creation of rights in rem it does not matter; nor does it for the purposes of a claim arising from non-delivery or short delivery. If the seller delivers nothing at all, the buyer sues in respect of the whole quantity. If he delivers only part, then he can appropriate the delivery to whichever of the contracts he prefers, paying the price fixed by that contract, and claiming damages in accordance with the prices under the other contracts.*
>
> *In the present case, there is nothing in the award to suggest that the contracts differed even as regards price. This being so, it seems to me quite unnecessary to read s 16 so as to produce a different result in the case of four contracts comprising the entire bulk from the one which would have been reached if there had been a single contract for the whole.*

[46] From the foregoing reasoning which I would respectfully adopt, it is evident that in the instant case where there were three parallel contracts of sale between the plaintiff as the sole buyer, and KPB as the original seller of homogeneous crude palm oil in bulk, it was not necessary for the different quantities specified by the contracts or bills of lading to be segregated in order to be ascertained and appropriated to the contract. The price of the crude palm oil per metric ton is the same, the end purchaser of the entire bulk is the same party, namely the plaintiff and the cargo is of a homogeneous nature such that it makes no difference whether the first part of the bulk is allocated to the first bill of lading or to the third bill of lading. As the plaintiff's cargo can be

specifically ascertained as a whole and identified, ie ascertained, it follows that it makes no practical difference that the bulk comprises three parallel contracts evidenced by three bills of lading rather than a single contract for the purchase of the homogeneous whole. In other words, if the goods could be considered to be ascertained and appropriated if there had been a single contract rather than three, then there is no reason, in the instant case where the single purchaser has contracted to purchase the entire bulk of homogeneous material, to conclude that there has been no ascertainment and appropriation simply because the bulk has not been physically segregated into three parts.

[47] In the Elafi, Mustill J also highlighted a further reason why the argument that property does not pass until such physical allocation occurs fails. His Lordship reasoned that if indeed property did not pass until the goods were physically segregated then it could only pass when the goods were physically allocated between the various contracts. However in that case there was no basis to show that the eventual division at the discharge port was indeed in accordance with, or bore any relation to the four contracts for those goods. As such he concluded that logically, property would never pass at all whatever the intention of the parties, because there had, on such reasoning, been no segregation in accordance with the four contracts. This would not sit with s 16 of the English Act (or s 18 of the SOGA). On those grounds he concluded that the only acceptable construction to be adopted was the common sense approach to ascertainment as applied in *Wait and James v Midland Bank Ltd* .

[48] In like manner in the instant case, if the defendant's contention is to be adopted, it would follow that as the 1,998.518 metric tons of crude palm oil in bulk was not physically segregated in accordance with the quantities specified in the bills of lading, property would not pass upon the cargo being loaded onto the Istana VI because there would be no appropriation to the contracts or bills of lading. Neither would property have passed upon the discharge of the crude palm oil into the bonded shore tanks at Port Klang as again there was no segregation in accordance with the bills of lading. As such title would never have passed from KPB to the plaintiff or otherwise, notwithstanding that the oil was not only discharged but taken to the use of Mewah Oils subsequently. This is an untenable result and again, I respectfully adopt the reasoning of Mustill J in concluding that the only practical way of construing ss 18 and 23(1) of the SOGA for the purposes of ascertainment and appropriation in the instant case is that ascertainment occurred when the crude palm oil comprising 1,998.518 metric tons was loaded onto the vessel at Dumai into separate tanks without co-mingling with the remainder of the bulk belonging to Ivomas. The fact that there was no separate allocation or segregation in relation to the bills of lading did not in itself, prohibit or preclude appropriation to the contract.

[49] In the same case, the distinction between ascertainment and appropriation was also considered. In that case too, the contention that there was no appropriation of the goods to the individual contracts before the moment of loss was raised. Mustill J reasoned as follows in relation to this point:

> ... It is true that in some cases the ascertainment of goods may not be the same as the unconditional appropriation of them, although the distinction will usually be difficult if not impossible to draw. But here I cannot see any difference. On the hypothesis that all the goods were the subject of parallel contracts between the same parties, the facts which constituted the ascertainment of the goods so as to release the inhibition created by s 16 on the passing of the property must have been the same as those which constituted appropriation for the purpose of ascertaining the parties' intention as to the passing of the property for purposes of s 18 r 5. Mr Eder did not suggest how, in a case like this, it would be possible to have ascertainment without appropriation, or vice versa. This being so, it appears legitimate to place appropriation on the same broad basis as ascertained, and hold that it is sufficient if the whole of the bulk can be identified with the contracts taken as a group.

[50] In the instant case the whole of the bulk stored in specified tanks on the vessel can be identified with the three bills of lading or contracts taken as a group. As such, the facts which constituted the ascertainment of the goods are the same as those which constitute appropriation for the purpose of ascertaining the parties intention as to the passing of the property. The facts of the instant case are such that there is no real distinction between ascertainment and appropriation. It may well be different where there are multiple buyers of the entire bulk, where differentiation between the various buyers under their individual contracts necessitates segregation of the physical bulk before property can pass. That is however, not the case here. It is my finding that ascertainment and appropriation to the contract occurred upon storage of the 1,998.518 metric tons of crude palm oil in the vessel's storage tanks at specific points. Therefore the contention that there is an inhibition arising which prohibits or precludes property from passing from the seller, KPB to the buyer, the plaintiff, by reason only that there was no ascertainment or appropriation of the goods to the contract, does not apply in the instant case. In this case, for the reasons above, I find that there was ascertainment and appropriation of the goods to the contract.

[51] Even if I am wrong in so concluding s 23(2) of the SOGA is relevant. It provides:

> (2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

[52] It follows from the foregoing section that so long as the seller has not reserved the right of disposal, then he is deemed to have unconditionally appropriated the goods to the contract. Save for the express reservation of the right of disposal, the act of the seller in delivering the cargo to the carrier for the purposes of transmission to the buyer in itself deems the goods appropriated to the contract. In the instant case, the original seller, KPB did indeed deliver and load the vessel's tanks with the 1,998.518 metric tons of crude palm oil and this, save for the reservation of the right of disposal (which is considered below) amounts to an unconditional appropriation of the goods to the contract under s 23(2). As such I am fortified in my conclusion that ascertainment and appropriation to the contract took place between KPB and the plaintiff upon loading and storage of the crude palm oil into the storage tanks of the vessel in defined tanks.

[53] This then takes us to the question of the reservation of the right of disposal. In this context, s 25(1) and (2) of the SOGA are relevant and applicable on the facts of the instant case. The sections provide:

> (1) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract the seller may by the terms of the contract or appropriation reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.
>
> (2) Where goods are shipped and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is prima facie deemed to reserve the right of disposal.

[54] In the instant case the bills of lading were made to the order of the shipper, ie KPB. As such in accordance with s 25(2), it would appear that the seller, ie KPB has prima facie, reserved the right of disposal thereby precluding the passing of property from itself to the buyer plaintiff. The Court of Appeal in the United Kingdom had occasion to discuss such a reservation of title in *Mitsui & Co Ltd & Anor v Flota Mercante Grancolombiana SA* [1988] 1 WLR 1145 where it was said, inter alia:

> ... Here by the bills of lading the goods were deliverable to the order of the sellers; consequently the prima facie presumption is that they reserved the right of disposal. Unless the presumption is displaced that has the result that the property did not pass to the buyers until the condition imposed by the sellers was fulfilled. That condition was, presumably, that the balance of the price be paid (see also *Mirabita v The Imperial Ottoman Bank* 3 Ex D 164).

[55] Such reservation of the right of disposal in the instant case begs the question why and for what reason KPB reserved the plaintiff's right to title. The question is answered in sub-s 1 which provides that notwithstanding delivery of the goods to the carrier for the purposes of transmission to the buyer, the property therein does not pass until the condition imposed by the seller is fulfilled. There was in effect, conditional appropriation of the cargo to the buyer, the plaintiff upon the loading of the cargo on the vessel. Did such conditional appropriation become unconditional? This would depend on whether or not the condition imposed by the seller was fulfilled.

[56] What then was the condition imposed by the seller? In an fob contract for the sale of goods the remaining condition that required fulfillment would be that of consideration or payment. The seller, KPB in the instant case, sought a reservation of the right of disposal until payment or consideration was received in full from the buyer, whereupon the condition would be satisfied, and the reservation of the right of disposal removed, resulting in the property moving from the seller to the purchaser.

[57] In this context the plaintiff maintains that KPB was paid in full on or by 23 October, whereupon KPB passed the bill of lading made out to its order, and endorsed the same prior to handing possession of the same to the plaintiff thereby clearly relinquishing title as well as possession of the cargo to the plaintiff. The defendant contends otherwise, maintaining that on the evidence before the court the plaintiff has not proved that consideration was received at any time between 23 October to 26 October such that the reservation of the right of disposal remained in place during this period, ensuring that property did not pass to the plaintiff during this time. The issue of whether or not the plaintiff had paid in full on or by 23 October 2003 has to be determined on the basis of the evidence before the court.

[58] PW2 was the primary witness who dealt with payment on behalf of the plaintiff. PW2 who is the managing director of the plaintiff gave evidence in the course of examination-in-chief that the plaintiff had made payment for the cargo before loading onto the vessel and by 23 October. In support of this contention he relied on, inter alia, debit advice statements from the plaintiff's bankers, American Express showing that the plaintiff's account was debited for the entire purchase price on 20 October 2003 and 23 October 2003 and sent directly to KPB's bankers, Bank Mandiri Medan. This is further fortified by the plaintiff's bank statement for the month of October 2003 which shows that on 20 October 2003 the plaintiff's account was debited by USD389,250 and on 23 October 2003 by 347,500 comprising in total the entire purchase price for the 1,998.518 metric tons of crude palm oil. PW2 also made reference to

exh P17 which is termed a bill of exchange and which PW2 testified was a receipt from KPB or a confirmation that the money had been fully paid to KPB by 24 October 2009.

[59] In the course of cross-examination it was put to PW2 that the name of the beneficiary was not stated in the bank advice statements he relied on to state that payments were effected to KPB on 23 October. PW2 maintained that one of the advice statements did provide the beneficiary while the other did not. PW2 confirmed that he was the one who gave instructions to the plaintiff's bankers, American Express, to make the requisite payments for the cargo in two tranches as stated above. It was further put to PW2 that if the monies were remitted by telegraphic transfer then there ought to be a bank advise with the name of the beneficiary. PW2 maintained that the plaintiff paid from Singapore and that the beneficiary's name was not always there. There could be a SWIFT number instead. When it was put to PW2 that he had no document which stated specifically that KPB had received the money, PW2 maintained that the plaintiff did have such a document, namely the bill of lading. He further explained that KPB had to be paid prior to the loading of the cargo onto the vessel.

[60] PW2 was then referred to a document entitled a bill of exchange which, it was put to him, meant that it was a request from KPB to the plaintiff for payment. PW2 explained that it was not a bill of exchange in the sense of requiring payment from the plaintiff as the document made reference to 'cash' rather than to a letter of credit. He stated that as the plaintiff had paid by cash, the bill made no reference to a letter of credit number and therefore served as a receipt for the cash payment. He reiterated that the plaintiff paid before the cargo was loaded. He was then asked why KPB would make a demand if the monies had already been telegraphically transferred to it. PW2 replied that this was the standard mode of acceptance by KPB. He said that the standard acceptance was letter of credit. But if the plaintiff paid by cash then KPB would insert cash instead.

[61] When queried about the receipt of the bill of lading from KPB, PW2 stated that it was obtained by the plaintiff on 24 October 2003. He maintained that the plaintiff did not procure the bill of lading together with other documents such as the certificate of origin, health certificate etc. The bill of lading was collected from KPB. PW2 further explained that the plaintiff did not get these documents from the bank, but collected them. He was then referred to a letter from KPB which appeared to attach all relevant documents including the said certificates, which was however, addressed to KPB's bankers. PW2 asked in turn how it could be known that KPB had submitted these documents to the bank. He then went on to explain that KPB is a joint marketing office which belongs to several state owned companies in Indonesia.

They deal with palm oil and other commodities. KPB sells on behalf of these several entities. Upon receipt of payment KPB would then divide the money to the various state owned entities in accordance with their entitlement. And he pointed out to the fact that the split of the monies is reflected in the document referred to him.

[62] It was then put to PW2 that KPB sent the invoice, the bill of lading, health certificates and the bill of exchange to the bank for collection by the plaintiff only after 27 October 2003, and that KPB was not paid before 27 October 2003. The plaintiff replied that he disagreed with the contention, reiterating that the plaintiff could not have loaded the cargo prior to payment in full. He was then referred to documents such as the certificate of origin which is dated 27 October. It was put to him on the basis of the same that payment could only have been tendered on 27 October 2003 to KPB's bankers. PW2 responded by stating that the certificate of origin had nothing to do with payment and that one certificate was dated 27 October while an earlier one was dated 24 October. He disagreed that payment was effected as late as 27 October. He was next asked when the endorsement from KPB on the reverse side of the bills of lading was made. PW2 confirmed that this was on 23 October. He also confirmed that the subsequent endorsement by the plaintiff was effected on 27 or 29 October. PW2 stated that upon endorsing the bills of lading he passed them to his bankers, Bank Niaga together with other documents for the purposes of negotiating with the issuing bank for Summerwind.

[63] Apart from PW2 who is a witness of fact, the defendant also called Suharyanto, DW2 ('DW2') who testified as a person having experience with both bills of exchange and letters of credit. He is the Assistant Vice-President of the Trade Servicing Centre in PT Bank Mandiri (Persero TB) and testified in his personal capacity. He was referred to the document called a bill of exchange bearing number CPO/W/495 and was asked to comment on the same. He testified that it appeared to be issued by KPB as drawer demanding payment from the plaintiff. He further testified that if KPB came to Bank Mandiri with this bill of exchange it would be attached with other supporting export documents and that Bank Mandiri would then collect payment on behalf of KPB from the plaintiff's bank who would in turn collect payment from Lushing. He maintained that the bill of exchange is an order by KPB to the plaintiff to pay at sight to Bank Mandiri or to order. However he went on to add that he had never seen the notation 'cash' on a bill of exchange before. He assumed that that meant that the bill was a 'non-exchange LC' bill of exchange. He went on to surmise how he supposed such a document would work in practice. DW2 also testified that the bill of exchange could not be assumed to be a receipt for payment. He therefore concluded that at the time of drawing and submission of the bill of exchange '... it cannot be certain that payment has

been made'. He went on to state that as of the date of the bill, namely 24 October 2003 '... it could not be said for certain merely by looking at the bill that KPB had received payment'. Similarly when the debit advice statements from the plaintiff's bank were referred to DW2 he maintained that it could not be certain that the monies had been remitted to the account of KPB and that there ought to be other documents to prove that the transfer was effected by American Express Bank to Bank Mandiri. He further testified that if the plaintiff's bankers had transmitted the monies vide SWIFT, then there should be a communication to that effect between the banks.

[64] In cross-examination DW2 confirmed that he did not have any personal knowledge of the shipment carried by Istana VI in October 2003. He also confirmed that he had no expertise on bills of lading in practice but did have experience with regards to letters of credit. DW2 was therefore unable to reply to the question put to him that in accordance with accepted shipping practice the carrier should only deliver cargo to persons who are able to surrender the original bills of lading.

[65] He agreed that the bill of exchange referred to him at p 121 of the common bundle of documents was issued by KPB to the plaintiff. He stated that in his experience such a document is commonly sent through the bank but not directly to the drawee. He agreed however that the bill of exchange in the instant case was issued by KPB. He disagreed that it could amount to an acknowledgement of payment by Lushing but agreed that he had never seen a bill of exchange with the words 'cash' before.

[66] When referred in cross-examination to the debit advice statements from American Express, the plaintiff's banker, DW2 stated that he was unable to confirm from the same that transfer of the funds had been effected by American Express. He went on to state that as he was not an American Express officer, he could not be certain that Lushing's account had been debited. When shown the plaintiff's statement of account for the month of October 2003 as well as the original debit advice, DW2 stated that the debit advice corresponded with the statement of account. He refused to agree that these documents evidence payment made to KPB's account on the basis that there should be other documents to prove this, but would not go so far as to state that KPB did not receive these monies. He maintained that he could not be certain that KPB had received payment based on these documents.

[67] DW2 did however agree that the debit advice statements were notice to the account holder that their account had already been debited and that all debit entries ought to be based on instructions from the client. DW2 also stated that one of the major methods of payment in non-letter of credit transactions was telegraphic transfer. It was put to him that telegraphic transfer

was the mode adopted by the plaintiff to pay KPB. DW2 stated that in his experience, the plaintiff ought to have filled in an application for transfer. He conceded that as he had no expertise on American Express procedures, he could not be certain that the letter issued by PW2 was a valid instruction to effect transfer.

[68] DW2 was also cross-examined about fob contracts and control of the cargo. He explained that delivery on board the vessel did not necessarily mean that payment had been made in full. However he stated that even after shipping the goods the shipper could still control the same provided that all original bills of lading belonged were held by the shipper. It was put to him that as KPB had given their original bills of lading to the plaintiff it meant that they had received the payment as referred to in the American Express bank statements. DW2 refused to confirm this maintaining that he had no knowledge of the same.

[69] I have considered the evidence of PW2 and DW2 in its entirety. The issue at hand requires a consideration of whether, on the evidence now before this court, the plaintiff paid KPB the price of the cargo between 23 October and before the end of 26 October. From the documents produced by the plaintiff, namely the instructions issued by PW2 to the plaintiff's bankers on 16 October 2003, it appears that the plaintiff did indeed instruct its bankers, American Express to debit its account for the full price of the cargo in two tranches in accordance with each sale contract, to the account of KPB at its bank, namely Bank Mandiri, Medan Branch. This is further fortified by the direct evidence of PW2 who as the managing director of the plaintiff had personal knowledge of the matter, particularly as he instructed such a drawdown personally. The plaintiff has also produced the debit advice from its bankers dated 20 October 2003 and 23 October 2003 respectively together with the bank statement for the month of October 2003. These documents taken cumulatively show that on 20 and 23 October 2003 the plaintiff's account was drawn down or debited by two tranches collectively making up the price of the cargo. As such by 23 October 2003 the plaintiff's account had been debited by the full purchase price for the cargo. It is also evident, despite the fact that no beneficiary's name appears on the debit advice that the monies were sent to the account of KPB in Bank Mandiri, Medan. This is borne out by the fact that KPB passed the requisite bills of lading duly endorsed to the plaintiff immediately thereafter, on 24 October. PW2 further confirms this fact. In any event as DW2 stated there is nothing in the evidence before the court to show that the plaintifff's bankers did otherwise than comply with the instructions of PW2 on behalf of the plaintiff to pay KPB through its bankers for the cargo. As such it follows that the purchase price of the cargo was debited from the account of the plaintiff and for the benefit of KPB through its account at Bank Mandiri Medan by 23 October 2003 and such payment was corroborated by the delivery of the bills of lading to the plaintiff the following day.

[70] I am unable to accept the defendant's position that the document on p 121 of the common bundle of documents shows that a bill of exchange was tendered by KPB to the plaintiff demanding for payment on 24 October. This is because there are no events or other documents showing or suggesting that this bill of exchange was tendered in any manner to the plaintiff as a consequence of which payment was subsequently made. The chronology of events and the contemporaneous documents disclose instead that payment was made prior to the issuance of this document. Further DW2 himself stated that he had not before seen a bill of exchange which stipulated 'value received, drawn against L/C No Cash'. There is no evidence before this court that the plaintiff paid for the cargo with the use of a letter of credit. On the contrary the unrefuted evidence of PW2 shows that payment was by way of telegraphic transfer meaning that the monies were remitted directly to KPB's bankers. As such it appears to this court that the document on p 121 of the common bundle of documents is indeed an acknowledgement of payment by KPB, or a form of receipt rather than a bill of exchange requiring or demanding for payment from the plaintiff.

[71] As for the other documents such as the certificate of origin and the health certificate, I accept PW2's evidence that these documents do not relate to payment but relate to the cargo itself. There is no evidence before this court that the transaction was effected by the use of a letter of credit between the plaintiff and KPB that required the submission of all these documents prior to payment being made by the plaintiff. The fact that the bills of lading duly endorsed were made available to the plaintiff on 24 October is compelling evidence otherwise.

[72] I also take into account the fact that DW2's evidence in totality, taken at its highest, stipulates only that he is not able to state with certainty that KPB did indeed receive the payment made. When this is contrasted with the evidence of PW2 who had direct knowledge of the transaction and who has, indeed produced contemporaneous documents to corroborate his statements, it appears to this court that the plaintiff has shown on a balance of probabilities that payment was indeed effected in favour of KPB on or by 24 October 2003 at the latest, and I so find. Of particular significance is the fact that the bills of lading were made available to the plaintiff by 24 October 2003 thus evidencing receipt of payment on the part of KPB.

[73] As a consequence of the finding of this court that consideration or payment for the cargo was received by KPB on or by 24 October 2003, it follows that the condition imposed by KPB relating to the appropriation of the goods to the contract, was fulfilled. It will be recalled that pursuant to s 25(3) of the SOGA, where the bill of lading is made out 'to order' it follows that there is a rebuttable presumption that the seller conditionally appropriated the goods

to the contract only. It has also been discussed above that the condition requiring fulfillment is the payment of the purchase price. The effect of making payment would therefore be to rebut the rebuttable presumption. As a consequence the conditional appropriation would then become unconditional appropriation. On the facts of this case therefore, as payment was effected on or by 24 October 2003, it follows that the presumption of retention of title by KPB was rebutted by such payment, whereupon the conditional appropriation of the cargo became unconditional appropriation. As such, property in the cargo passed from KPB to the plaintiff on or by 24 October 2003. It therefore follows that when the cargo was discharged at Port Klang between 24 (8pm) and 26 October the property in the cargo had passed from KPB to the plaintiff. By reason of my conclusion as to the date when property passed from KPB to the plaintiff, it follows that the cargo belonged to, or was owned by the plaintiff at the material time when it was discharged into Mewah's bonded shore tanks. The plaintiff as owner of the cargo is entitled to maintain this action in tort in relation to 'misdelivery' or for conversion. The plaintiff does possess title to sue.

Does the plaintiff possess title to sue under s 1 of the Bills of Lading Act 1855?

[74] The next issue for consideration is whether the plaintiff is entitled to sue in contract as holder/endorsee of the three bills of lading pursuant to s 1 of the Bills of Lading Act 1855 ('BOLA'). The plaintiff would be entitled to sue under this section if they are the persons to whom the property in the cargo passed 'upon or by reason of' the endorsement of the bills of lading. Section 1 of BOLA provides as follows:

> Every consignee of goods named in a bill of lading and every endorsee of a bill of lading *to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or endorsement*, shall have transferred to and vested in him all rights of suit and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself. (Emphasis added.)

[75] It is to be noted that the property in the goods does not pass by the endorsement but by the contract in pursuance of which the endorsement is made per Lord Bramwell in *Sewell v Burdick* (1884) 10 App Cas 74. In other words, while the bill of lading cannot itself directly transfer the property in the goods merely by way of endorsement it is a part of the mechanism by which property is transferred. The competing positions taken by the parties here is as follows.

[76] The defendant contends that the property in the cargo which was shipped by the original seller KPB, did not pass to the plaintiff 'upon or by reason of' the endorsement on the bill of lading, thereby depriving the plaintiff of recourse under the section. The stance taken is that the endorsement of the

bills of lading did not signify or play a causal part or event in the passing of property from KPB to the plaintiff. The plaintiff on the other hand maintains that the endorsement on the bills of lading were an effective and integral part of the passing of property from KPB to the plaintiff. Therefore the issue that arises for consideration is this:

(a) Did the property in the cargo pass to the plaintiff from KPB 'upon or by reason of' the endorsement of the bills of lading?

[77] The leading case on the interpretation to be accorded to s 1 is the English Court of Appeal decision in *Enichem Anic SpA and Others v Ampelos Shipping Co Ltd (The Delfini')* [1990] 1 Lloyd's Law Reports 252. Lord Justice Mustill considered the interpretation to be accorded to s 1 thus:

> ... The authorities being so thin, it is necessary to go back to the wording of s 1 itself, read in the light of the preamble to the Act. I believe that the Act means what it says in this respect — if not, as more than one judge has pointed out, in all respects. Section 1 presents two alternative situations in which the contract is transferred to the endorsee. The first is where the property passes 'upon' the endorsement (and delivery of the document). This means that the passing of property is simultaneous with the endorsement, and that the endorsement is the act which brings it about: albeit, as *Swewell v Burdick* teaches, it will do so only if that is what the parties intend. The second is where the property passes 'by reason of' the endorsement. This must signify something different since the expression is 'upon or by reason of' not 'upon and by reason of'. In my judgment it means that although the endorsement of the bill is not the immediate occasion of the passing of property, nevertheless it plays an essential causal part in it.

[78] It follows from the foregoing that in order to enjoy title to sue under s 1 of the BOLA, the title to the property in the cargo must have passed to the plaintiff from KPB either 'upon' or 'by reason of' the endorsement on the bills of lading. If property in the cargo passed from KPB to the plaintiff independently of such endorsement then the property in the cargo or title to the cargo did not pass on endorsement of the bills of lading by KPB, nor as part of a chain of causal events linking or forming the link between the passing of property and the endorsement. It is therefore necessary to ascertain whether the passing of property from KPB to the plaintiff co-incided with the endorsement on the bills of lading or whether the endorsement formed a part of a causal chain of events 'by reason of' which property passed as stated.

[79] In this context the defendant submits that the plaintiff has taken the position, relying on the evidence of PW2 that the passing of property from KPB to the plaintiff took effect when the cargo was loaded onto the Istana VI at Dumai on 23 October 2003. While not resiling from the stance that such a position is wholly inconsistent with the factual matrix of the case, whereby KPB took the bills of lading in its name for delivery to its order on 23 October,

and issued an invoice dated 27 October, the defendant submits that if property did indeed pass on 23 October then such transfer of title was independent of the endorsement on the bills of lading. The defendant maintains that while the bills of lading may have been necessary for other purposes, such as taking delivery of the cargo and tendering for re-sale to Summerwind under the terms of the letters of credit, the endorsement on the bills of lading was not integral to the passing of property from KPB to the plaintiff.

[80] The plaintiff on the other hand maintains in its submissions that the sale and transfer of property by KPB was unconditional, total and outright when KPB loaded the cargo on board the vessel, endorsed and gave the original bills of lading to the plaintiff on 24 October 2003.

[81] I have considered at some length above, the sequence of events leading up to the passing of property from KPB to the plaintiff. It has been concluded above that property passed from KPB to the plaintiff on or by 24 October and before 26 October 2003. What role then did the bills of lading play? As discussed above the cargo was loaded onto the vessel, Istana VI on 23 October. The shipper, KPB retained a right of disposal by issuing the bills of lading 'to order' rather than naming the plaintiff as consignee. That amounted to a conditional appropriation of the cargo. I have already dealt with the issue of ascertainment and appropriation in relation to the bulk cargo of palm oil and do not propose to repeat myself. I have further concluded that as payment or consideration was received by KPB on or by 24 October, the condition giving rise to the retention of disposal of the cargo by KPB, was fulfilled. As a consequence the appropriation became unconditional, after which the cargo became appropriated unconditionally to the contract, and property passed. In other words property passed on 24 October 2003. In recognition of such transfer in the property entitlement, KPB endorsed the bills of lading and gave possession of the same to the plaintiff. There is clear evidence before this court from PW2 which discloses that the plaintiff received the duly endorsed bills of lading from KPB on 24 October 2003 when the plaintiff collected the same. In other words, the passing of the property coincided with, or was closely related to the endorsement on the bills of lading. In fact the physical handing over of the duly endorsed bills of lading in favour of the plaintiff shows clearly that KPB had relinquished both property in, and possession of the cargo as of 24 October. To my mind this is clear evidence of the fact that the property in the cargo passed 'upon' or at the very least 'by reason of' the endorsement on the bills of lading. The passing of the property in the cargo and the endorsement on the bills of lading are so inextricably connected, and the nexus between the two events are so closely linked as to warrant the inexorable finding that property passed upon, or by reason of, the endorsement on those bills of lading. It cannot, to my mind, be concluded on this factual matrix that the two events are

independent or entirely unconnected. For these reasons I find that the plaintiff does possess title to sue in contract under BOLA as a lawful endorsee in possession of the bill of lading.

[82] Prior to leaving the issue of the plaintiff's entitlement to sue albeit under BOLA or in tort, one further evidential issue that requires brief consideration is in relation to conversion. In order to found its claim in conversion, the plaintiff must have had in its possession the duly endorsed bills of lading at the time when the cargo was discharged on 26 October 2003, in order to establish that it was entitled to immediate possession of the cargo upon production of those bills of lading. The defendant maintains that there is conflicting evidence tendered by the plaintiff as to when it came into possession of the bills of lading. The defendant points to the evidence of Khaja Shaukath Ali bin Mohamed Siddique, PW1 ('PW1') who first testified that the original bills of lading came into the plaintiff's hands vide its bankers on 24 October together with other documents dated 29 October 2003 which it is contended is highly improbable. In fact a perusal of PW1's evidence in its entirety discloses that he testified that the bills of lading were passed to the plaintiff on 24 October 2003. This is what he said:

Q: Were the TT payments to Kantor made before or after the documents came into the hands of Lushing?

A: Payments were made before.

Q: When was this payment again?

A: 20th and 23rd of October 2003.

Q: When were the BLs passed to Lushing?

A: On 24 October 2003. I was keen on the BL. The other documents were just supplementary.

Q: And all the other accompanying documents, certificates etc?

A: I can't confirm. But Burhanuddin can confirm.

Q: How did you get the original BLs?

A: The BLs were delivered to the office. My previous statement is incorrect and I withdraw it. It did not come from the Bank.

Q: So what came from the Bank?

A: You have to ask Burhanuddin. I remember however that the BL was in the office.

Q: So what came from the Bank?

A: You have to ask Burhanuddin. I remember however that the BL was in the office.

Q: Are there any dates or endorsements with the BLs?

A: I recall the covering letter. I saw it and I saw the BL. Burhanuddin's office is large

with many departments. I saw this document and the original Bill of Lading on 24 October 2003 in Lushing's office in Jakarta.

Q: How did it come?

A: Someone delivered it. I did not see who delivered it.

Q: Is there an acknowledgement of receipt.

A: I was not there to confirm this. Burhanuddin can confirm this.

[83] Earlier on in cross-examination, PW1 had stated as follows:

Q: How did KPB pass the BL to Lushing?

A: We received the documents from the Bank. Payments were made to the Bank.

Q: When did Lushing receive the documents from the bank?

A: 24 October 2003.

Q: Did KPB pass any other documents to Lushing together with the Bills of Lading?

A: The covering letter, 3 sets of invoices, 3 sets of original BL, Certificates of Origin, Health Certificates, Phytosanitary certificate.

[84] It is based on this latter series of questions that the defendant maintains that there is a conflict as to when the bills of lading were actually in the plaintiff's possession. It is suggested from the foregoing that it is not clear that the plaintiff actually had possession of the bills of lading until 29 October. Having considered PW1's evidence as a whole, coupled with PW2's clear uncontroverted evidence that the duly endorsed bills of lading were received by the plaintiff on 24 October 2003 it appears to this court that PW1 did indeed make a genuine mistake when he initially testified that the bills of lading were received by the plaintiff from the bank together with other documents which were subsequently dated. PW1 clarified his testimony and maintained that PW2 was more cognisant of this fact. There does not therefore appear to be a serious conflict as to the date of receipt of the bills of lading by the plaintiff. The bills of lading were received on 24 October, thus rendering the plaintiff in possession of the same at the time of discharge of the cargo on 26 October, thereby enabling them to found a cause of action in conversion.

Did the discharge of the cargo into bonded shore tanks belonging to Mewah Oils in Port Klang amount to delivery or not?

[85] It is contended on behalf of the defendant that there is a real distinction in fact and law between 'discharge' and 'delivery'. It is maintained that while the cargo was discharged into bonded shore tanks at Port Klang, the cargo was

not delivered to Mewah Oils Sdn Bhd. No delivery order was issued by the defendant or its agent in respect of the cargo. In support of this, reliance is placed on the testimony of DW1:

Q: Do you also agree that the Plaintiff claiming against the Defendant for delivery of cargo without B/L?

A: No, because we never delivered the cargo.

Q: What do you mean by that?

A: We never delivered the cargo means the cargo is still in the bonded shore tank as there is no B/L delivered to collect the cargo.

... and later on

A: This paragraph 2 mentions delivery of the cargo. But in this case we never delivered the cargo.

A: As I said, we never delivered the cargo.

...

Q: Refer to page 135. I put to you by virtue of this letter of 31 December 2003 by Defendant that the Defendant had actually delivered the cargo to Mewah.

A: We are not the ones who delivered.

...

A: I don't agree. Because we only discharge the cargo, not release or deliver the cargo.

[86] The defendant thus contends that there was no delivery of the cargo to Mewah Oils Sdn Bhd as alleged by the plaintiff, merely into bonded shore tanks.

[87] A perusal of the entirety of DW1's evidence discloses, inter alia, the following:

Q: What happened to the cargo upon its arrival at Port Klang, Malaysia?

A: Upon the instruction of Summerwind and its provision of two letters of indemnity both dated 23 October 2003 in favour of TCK, TCK discharged the cargo into Mewah Oils Shore Tank at Port Klang between 24-10-2003 and 26-10-2003.

Q: Did TCK discharge the cargo into Mewah Oils' shoretanks upon the production of the original 4 bills of lading?

A: No. Pursuant to the terms of the Charterparty, TCK was obliged to release the cargo in the absence of the original bills of lading but in accordance with the instruction of the charterer against the Charterer's Letter of Indemnity.

In short voyages of about a day, such as from Dumai to Port Klang the original bill of lading is normally unavailable for presentation at the time of the vessel's arrival it is therefore common in the trade to release the cargo without the production of the original bill of lading.

However it is the practice of TCK not to release the cargo without production of the original bill of lading but only to discharge the cargo to bonded shore tanks. In this instance the discharge of the cargo into the shoretanks of Mewah Oils at Port Klang between 24-10-2003 and 26-10-2003 was pursuant to instructions by Summerwind and pursuant to their Letters of Indemnity both dated 23-10-2003 ...

Q: Was there delivery of the cargo to Mewah Oils by TCK at Port Klang between 24-10-2003 to 26-10-2003?

A: No.

Q: What is the difference between discharge and delivery of the cargo?

A: By discharge of the cargo, I mean discharge of the cargo to the bonded shore tanks of Port Klang. The holder of the Bill of Lading must do something more before he may obtain delivery of the cargo and remove the cargo from the bonded shoretanks, which include presenting the bills of lading at the customs for clearance of the cargo and payment of custom due and obtaining a delivery order from TCK's ship agent in exchange for the original Bills of Lading ...

[88] The foregoing explains the position taken by the defendant in maintaining that it merely discharged the cargo, without actual delivery to the third party receiver. In the course of cross-examination, DW1 conceded that the bonded shore tanks into which the cargo was discharged, was under the control of Mewah. This is what he said:

Q: My question is whether the tank is under the control of Mewah, do you agree?

A: Basically it is under the control of Mewah but procedural is under Customs' control.

...

Q: Please look at page 37 CBD. Isn't it your evidence just now that you received this time sheet?

A: Yes.

Q: Isn't it your evidence that the signature at the bottom is receipt by Mewah?

A: Yes but it doesn't mean that Mewah owns the cargo.

...

Q: Isn't it your evidence that the vessel started discharge into Port Klang between 24th and 26th October 2003?

A: Yes. The vessel discharged the cargo at that time.

A Q: Before the Istana VI discharged the cargo into Port Klang, do you agree that the Defendant never took any steps to find out who was the rightful owner of the cargo?

A: Yes.

B ...

Q: When the Istana VI discharged the cargo into Port Klang did the Defendant seek the permission of the shipper or the parties in the e-mail for the discharge of the cargo?

C A: No.

Q: I put to you that the failure to seek such approval is a reckless act on behalf of the Defendant.

A: I do not agree.

D Q: Before discharge of cargo into Port Klang did the Defendant check with Summerwind who is the owner of the cargo?

A: No it is not necessary.

...

E Q: Look at page 31 (CBD). Refer to paragraph 2, from 'consigned to order and notify Mewah Oils. Do you agree that this reference means that Mewah Oils is mentioned in the bill of lading?

A: No it is not named in the Bill of Lading. It is not named in the Bill of Lading at all.

F

...

Q: Refers to page 32 (CBD). Do you agree that the Mewah shore tank is a bulk liquid terminal or facility?

G A: Yes I agree but this shore tank is a bonded shore tank.

Q: I put to you by reason of paragraph 4 that the cargo was delivered to Mewah?

A: No. It was not delivered to Mewah.

...

H

[89] It is evident from the foregoing that DW1 maintained, notwithstanding the express reference in various documents to Mewah Oils Sdn Bhd that there was no actual delivery to this party, only discharge into

I bonded shore tanks. In this context it becomes necessary to consider the documentary evidence produced which assists in evaluating DW1's credibility and testimony as a whole. It will be recalled that Summerwind issued a global bill of lading containing the letter of indemnity on or around 23 October. In that global bill of lading Summerwind provides as follows:

> We the undersigned request that the master of the above vessel deliver the cargo consisting of crude palm oil in bulk and 3998.421mt and shipped by Kantor Pemasaran Bersama and Pt. Ivo Mas Tunggal at the Port of Dumai, Indonesia on 23rd October 2003 to the Port of Yantai, China, notwithstanding the original bills of lading having been issued, we Summerwind Trading Pte. Ltd. request the vessel to deviate her discharging port of calling for delivery at the port of Port Klang (West) Malaysia and consigned to 'to order' and *notify 'Mewah Oils Sdn. Bhd.' and without prior production of the original bills of lading*.
>
> ...
>
> ...
>
> 4. *If the place at which we have asked you to make delivery is a bulk liquid or gas terminal or facility or another ship, lighter or barge, then delivery to such terminal, facility, ship, lighter or barge shall be deemed to be delivery to the party to whom we have requested you to make such delivery* ... (Emphasis added.)

[90] From the foregoing it is evident that as of 23 October 2003, the defendant was appraised of the fact that the consignee of the cargo at Port Klang would be Mewah Oils Sdn Bhd. Moreover under the terms of the letter of indemnity issued by Summerwind, which document is relied upon by the plaintiff to maintain that the delivery was lawful, it is expressly stated that delivery to any terminal to which Summerwind authorises discharge, amounts delivery to the party to whom they had requested the defendant to make delivery to. In the instant case that would amount to delivery to Mewah Oils Sdn Bhd as requested by Summerwind.

[91] The defendants had also produced an email from DW1 to one Maritime Network Sdn Bhd which advised that the vessel had sailed from Dumai and that the expected time of arrival at Port Klang was on the 24 October at 1500 hrs. He further specified that the cargo on board comprised 3,998,421 metric tons of crude palm oil and that the party to be notified was Mewah Oils Sdn Bhd. More significantly, DW1 states: '... Since the charterers have issued LOI to discharge w/o original B/L, we, as owners herewith authorise you to discharge the cargo on board Mt Istana VI at her arrival at Port Klang West'.

[92] It is clear from the foregoing message issued by DW1 that the defendant had authorised discharge of the cargo to Mewah Oils Sdn Bhd without production of the original bills of lading by reason of the letter of indemnity issued by Summerwind.

[93] When the vessel Istana VI arrived at Port Klang, it tendered a 'Notice of Readiness' addressed expressly to 'Messrs Mewah Oils Sdn Bhd' notifying the latter that the vessel had arrived at 15.06 at Port Klang on 24 October 2003 and asking Mewah to commence discharging immediately. The said notice was

A accepted by Mewah at 20.00 or 8pm on the same day. In the light of this document which shows that the defendant at all material times was actively liaising with Mewah on the instructions of Summerwind, it appears less than credible for DW1 to maintain that there was no delivery of the cargo to Mewah.

B

[94] Finally, vide facsimile dated 31 December 2003 from the defendant to the plaintiff the defendant wrote to the plaintiff confirming that the cargo together with the remaining crude palm oil '... was delivered to the Receivers Mewah and was stored in their tanks'. This express reference to delivery to C Mewah Oils, as is the case with the several documents set out above was not explained by the defendant. Neither did DW1 in his evidence comment or explain the contradiction between the written documentary evidence where the defendant had maintained that the cargo was 'delivered' to Mewah, and his oral testimony in court where he stated categorically that the cargo was D discharged but not delivered.

[95] DW1 was, as is evident from a perusal of his evidence, was dogmatic in maintaining that while there was a discharge of the cargo into bonded shore tanks under the control of Mewah Oils Sdn Bhd this did not amount to E delivery, as there was no issuance of a delivery order by the defendant. Even where there was express reference to Mewah Oils as a consignee, DW1 refused to accept that the defendant had released the cargo to Mewah Oils Sdn Bhd maintaining that it was 'discharged' but not 'delivered'. On a perusal of the totality of the evidence, I was unable to accept DW1's evidence as being F entirely candid or straightforward, particularly in view of the documentary evidence produced by the defendant itself, which showed otherwise. As a matter of fact therefore there appears to be no tenable basis on which to contend that while there was discharge to bonded tanks under the control of Mewah, there was no delivery to Mewah Oils Sdn Bhd. The distinction is G illusory.

[96] Turning to the law, in the Singapore High Court case of *The Nordic Freedom* [2001] 1 SLR 232 Choo Han Teck J utilised the term discharge interchangeably with delivery. It was a case of delivery of cargo without the H production of original bills of lading. This is what the learned judge held:

> The claim by Hyundai Korea in this suit is based on conversion, breach of duty and breach of contract as carriers or bailees by virtue of the said bills of lading. There is no dispute that the cargo in question was discharged without the production of the I bills of lading which, at the time of this trial, were still in the possession of Hyundai Korea. The only substantive defence pleaded by the owners was as follows:
>
> The (owners) say that the vessel was at the material time on charter to Coscol Marine Corporation pursuant to a time charterparty dated 20 November 1991. In accordance with instructions received by the (owners) from the said charterers on or

about 29 May 1996, approximately 21,000 MT of the cargo was discharged into the shore tanks of the Thai Public Port Terminal which is a bonded terminal on Koh Sichang Island Sriracha. The balance of the cargo was in accordance with the said instructions from the Charterers discharged into lighters. The cargo being dutiable cargo in Thailand, the cargo was in effect delivered into the custody of the authorities in Thailand, to whom any application for delivery would have to be made. On their party the (owners) did not give delivery to a third party as alleged.

With respect I think that this defence does not meet the claim. It was not pleaded or proved that the owners were compelled to deliver up the cargo to the Thai authorities in circumstances beyond their control. Whether the cargo was dutiable orotherwise, and whether the Thai terminal was a private or public institution is not relevant. The cargo cannot be discharged without production of the bills of lading. That has been the clear and consistent approach in the authorities cited to me. There is no dispute that the cargo in question was discharged without the production of the bills of lading which, at the time of this trial, were still in the possession of Hyundai Korea.

[97] The case above bears considerable similarity to the instant case. In fact in *The Nordic Freedom*, the oil was actually discharged into a terminal falling within the authority of the Thai authorities. In the instant case, the bonded shore tanks belonged to Mewah Oils and were within the control of Mewah. That in itself displaces the contention that there was no 'delivery' to Mewah. The fact that the cargo was discharged into shore tanks within the control of Mewah effectively means that delivery was accorded to Mewah. The fact that there is no delivery order in existence does not alter the fact that the cargo was released to Mewah Oils Sdn Bhd. More importantly however the foregoing case reiterates the important principle that discharge or delivery has to be made against production of original bills of lading. Discharge, delivery or release of the cargo at the behest of the carrier, albeit under the terms of a charterparty, does not obviate the shipowner's liability to the owner of the cargo. I respectfully adopt the reasoning above and conclude that it is no answer to the plaintiff owner's claim for the cargo to maintain that there was discharge but no effective delivery to a third party, when such discharge was effected without production of bills of lading.

[98] In the Singapore Court of Appeal case of *The 'Cherry' and Others* [2003] 1 SLR 471 it was held, inter alia, that in delivering cargo without the production of the original bill of lading, the shipowners were in breach of their contractual obligations, unless they could establish that the instructions on which they acted emanated from the bill of lading holder or were given with his authority. In this context acting on instructions received from a third party or from a person with whom the carrier had a contract, such as a time charterer, would not release the carrier from liability. In this case the term 'discharge' was utilised interchangeably with delivery, such that there was no distinction apparent, as the defendant now suggests.

[99] And in *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* [1959] MLJ 200 which also dealt with delivery of cargo without production of the original bill of lading the Privy Council rejected the submission that the shipowner should not be liable for events occurring after discharge without production of the bill of lading, notwithstanding the terms of an express exemption. In that case the express exemption provided that '... in all cases the responsibility of the carrier ... shall be deemed to cease absolutely after they are discharged therefrom'. It was held: '... if such an extreme width were given to the exemption clause, it would run counter to the main object and intent of the contract. For the contract, as it seems to Their Lordships, has as one of its main objects the proper delivery of the goods by the shipping company, 'unto order or his or their assigns', against production of the bill of lading'.

[100] It follows therefore that the defendant, having chosen to act at the behest of the charterer, Summerwind and discharge or deliver the cargo to Mewah Oils Sdn Bhd, cannot now deny liability for such discharge, on the grounds that it did not actually 'deliver' the cargo to Mewah Oils as borne out by the absence of a delivery order. It is simply insufficient to meet the claim of the plaintiff, as the lawful endorsee and holder of the bills of lading, then and now.

Did the plaintiff intend, consent, authorise or acquiesce to the discharge of the cargo into Mewah Oils' bonded shore tanks?

[101] The defendant contends that it could not have discharged the cargo in exchange for the original bills of lading since the plaintiff had to, and did hold the original bills of lading for tender under the terms of the letter of credit provided by Summerwind, as at 6 November 2003. As a consequence of these terms in the letter of credit, the defendant maintains that the plaintiff knew and/or acquiesced to the discharge of cargo without bills of lading. This in turn, it is contended, absolves the defendant from all responsibility for the consequences of the discharge at Port Klang to Mewah Oils Sdn Bhd without production of the original bills of lading. In support of this contention, the defendant relies on PW2's testimony in cross-examination:

Q: Since you were holding the BL the BLs were not available at the port of discharge?

A: Yes.

Q: I put it to you that the shipowner was entitled to discharge the palm oil into tanks in Port Klang.

A: I will discharge it but I have to let the cargo owners know.

Q: And that stage when they were discharging the cargo right until 6 November 2003 did you inform the shipowners that you were holding the BL?

A: I am sending letter. I am asking where is the cargo.

Q: Repeats question.

A: I don't know. I am sure they had the communication between the agent and my man.

Q: So your man would have known that discharge was at Port Klang?

A: No.

...

Q: You needed to have the surveyor's report. What did you do to ascertain which vessel the port was at?

A: We had the reminder from Summerwind that we can't pay. After that we chased for the cargo.

Q: Did you contact the ship's agent in Dumai?

A: we go direct to Taruna Cipta.

Q: When was that?

A: I think it was 3 or 5 December 2003

...

Q: So between 23 October 2003 and 6 November 2003 the B/L was with Lushing?

A: Yes.

Q: Did Lushing try to tender the B/L to collect the cargo?

A: First we went to the Bank to negotiate the L/C. And then after we have the message from Summerwind that they can't pay, they failed to pay Then only we chased the cargo because we had the original BL/ Then we went to the shipping companies.

[102] In response to the defendant's contention, the plaintiff maintains that the failure of the defendant to discharge the cargo without production of the original bills of lading cannot be excused on the grounds raised by the defendant for the following reasons:

(a) The defendant had at all material times agreed with its charterer, Summerwind that discharge of the cargo would be effected without the production of the original bills of lading;

(b) The defendant proceeded to discharge the cargo immediately upon arrival at Port Klang without the issue of the lack of production of bills of lading even being considered addressed;

(c) The answers given by PW2 cannot amount to acquiescence or consent to the discharge of the cargo without production of the bills of lading given that such consent cannot be procured several years after the event in the course of trial; and

(d) If the transaction had proceeded as anticipated such that Summerwind had paid for the cargo, then the bills of lading would have been passed to their bankers and onto Summerwind for onward transmission to the defendant whereupon the discharge or delivery would have been in accordance with accepted practice. However because Summerwind did not pay for the cargo as it had contracted, the bills of lading remained with the plaintiff, as did title to the cargo, thereby entitling the plaintiff to demand against such bills of lading for possession of the cargo.

[103] Having considered the competing contentions, it appears to this court that on the entirety of the facts and events, it cannot be concluded or inferred from the circumstances existing at the material time, that the plaintiff in any manner consented or acquiesced to the discharge of the cargo in Port Klang to Mewah Oils Sdn Bhd. To amount to acquiescence or consent or acceptance of this fact, the plaintiff had to know in the first place that the cargo was being discharged in Port Klang and not Yantai. It also had to know that the possession of cargo belonging in law and in fact to it, was being given to Mewah Oils Sdn Bhd. In the course of the trial, no such evidence was adduced or put to the witnesses so as to warrant such an inference being drawn. I have heard and considered the testimony of PW2 in cross-examination reproduced above. It does not seem to me that from that exchange it can be gleaned that the plaintiff through PW2 accepted or consented to discharge of the cargo without production of bills of lading in Port Klang to Mewah Oils Sdn Bhd. The questions posed to PW2 are questions relating to the options open to a shipowner who chooses to comply with the directions and instructions of the charterer and who claims that he does not know who the owner or holder of the bills of lading is, or their whereabouts. In like vein, PW2 replied that a shipowner faced with such a situation could in fact discharge without a bill of lading but should do so having procured a letter of guarantee from the receiver. This does not mean that the plaintiff acquiesced or consented to the discharge of cargo as it occurred on 24–26 October. I accept the plaintiff's submission that the answers to theoretical questions well after the actual event, at trial, cannot amount to consent or waiver. In any event even if the defendant elected to act in accordance with the terms of the global bill of lading or letter of indemnity provided by Summerwind then the defendant does so at its peril, vis a vis the owner of the cargo, ie the plaintiff. It is open to the defendant to seek recompense from Summerwind. Indeed that was the purpose of the letter of indemnity from the outset.

[104] It is equally pertinent that on the facts of this particular case, the discharge of the cargo without production of the bills of lading at a port other than that represented by the bill of lading amounts to a serious misrepresentation which the defendant was fully cognisant of, yet chose to ignore when discharging the cargo to Mewah Oils Sdn Bhd at the behest of

Summerwind. The defendant chose not to ascertain from Summerwind or to check with the plaintiff itself, to whom it had issued the bills of lading, about the discharge of cargo without the bills of lading. It also failed at any time to advise the plaintiff, to whom it had issued bills of lading stipulating that the cargo was to be discharged at Yantai, that the destination had changed. This despite the clear terms of the letter of indemnity seeking such deviation. In all these circumstances it defies any logical construction to maintain that the plaintiff consented or acquiesced to a discharge of the cargo at Port Klang to an unknown third party.

[105] As for the terms of the letter of credit between the plaintiff and Summerwind which required the presentation of the original bills of lading to ensure payment to the plaintiff, this in itself does not detract from the shipowner's duty to discharge cargo against the production of original bills of lading, a principle long accepted and applied in such cases. In the Singapore case of *The 'Pacific Vigorous' [2006] SGHC 103* [2006] 3 SLR 374 the court noted:

> ... Agritrade was able to and did produce the original bills of lading at the hearing before the assistant registrar. As lawful holders of the bills of lading, Agritrade has a right to possession of the cargo against the defendant even after the cargo has been wrongly delivered to Bhatia.

[106] In the case of 'The Cherry' it was said:

> ... The bill of lading thus provided for delivery at Fujairah. There was nothing in it to contradict the normal understanding that the carrier was required to physically discharge the cargo from the vessel at the discharge port and thereafter deliver it to the bill of lading holder. As stated above, in order to excuse non-performance of the discharge obligation by the carrier, there would have to be evidence that such was also the intention and/or instruction of the respondents as the other party to the contract of carriage.
>
> As far as the instructions received by the carrier are concerned, for him to avoid liability he would have to show that those instructions emanated from the bill of lading holder or were given with his authority ...

[107] The case clearly sets out the position that the shipowner is required to discharge the cargo against production of the bills of lading in accordance with the terms of that bill of lading. In order to excuse discharge without the production of bills of lading, the shipowner would have to produce evidence showing that the plaintiff, ie the owner of the cargo and the holder of the bill of lading intended and/or instructed or consented to discharge in the terms effected by the shipowner. This begs the question where is the evidence of such intention or instruction or consent? Can it reasonably be inferred from the terms of the letter of credit that the plaintiff acquiesced or consented to

discharge of the cargo in Port Klang to Mewah Oils Sdn Bhd when the bill of lading issued to it by the defendant itself, shows that the cargo was to be discharged at Yantai, China for the consignee China Grain, Oil and Foodstuff? Further and in any event the letter of credit is a contract document between the plaintiff and Summerwind to which the defendant is not privy.

[108] Of greater significance and concern is the act of the defendant in issuing what in effect amounted to a false bill of lading. Thereafter the defendant failed to take any steps to check whether the plaintiff, from whom it had received shipping instructions and whose interest in the cargo it was aware of, was notified of the change in destination or consignee. Neither did the defendant ascertain any of these matters from Summerwind. The defendant's acts of recklessly agreeing to state a false destination at the request of Summerwind, coupled with the due discharge of the cargo against a letter of indemnity issued by the same Summerwind, its charterer, which letter of indemnity it has not to date enforced is not justifiable. In *Trengganu Forest Products Sdn Bhd v Cosco Container Lines Company Ltd & Anor* [2009] 7 MLJ 781 Ramly Ali J (now JCA) held as follows:

> ... If a bill of lading contains a statement as to the date of shipment and the ship's agent signs the bill knowing the statement to be untrue, the person so signing is liable in fraud to anyone who suffers loss by relying on the representation. This was stressed by *Scrutton Charterparties and Bills of Lading* (20th Ed) at pp 115–118, 434–437 in the following passage:
>
> In addition to founding estoppels, a representation in a bill of lading may give rise to an action in tort at the suit of a person who relies upon the representation, and thereby suffers loss. Thus, if a bill of lading contains a statement as to the apparent condition of the goods, or the date of shipment, or a similar matter, and the master or ship's agent signs the bill knowing the statement to be untrue, the person so signing is liable in fraud to anyone who suffers loss by relying on the representation ...
>
> The next question which arises is whether the false representation was made by the shipowners with the intention that it should be relied on. A shipowner clearly intends that the bill of lading which he issues should be relied on. He intends that it should be relied on by those into whose hands it properly comes: consignees, bankers, endorsees must be within his contemplation. A bill of lading is issued with the purpose that it should be relied on. This could not have been more clearly illustrated than it was in the testimony of the plaintiffs' witness. He knew, for example that the banks are very often prepared to advance money if clean bills of lading are forthcoming. If a shipper knows that he will only be paid if he can present a clean bill of lading and knows that the goods which he is shipping are so defective that they could not be given a clean bill, and if in order to get his money he persuades a shipowner to issue a clean bill, the bill will be relied on by others, it seems to me impossible to contend that the shipowner does not make a representation with the intention that it should be acted upon.

[109] It is true that the current action is not founded on the tort of deceit, but this does not mean that the acts of the defendant in falsely stating a destination knowing full well at all times that there was never to be a voyage to that destination, is to be simply ignored. This is a material and significant fact to be taken into account in deciding on whether or not the defendant had basis for maintaining that it has no liability to the plaintiff for delivering the cargo at Port Klang rather than China and to Mewah Oils Sdn Bhd rather than China Oils and Foodstuffs. Such complicity with Summerwind in misrepresenting the destination on the bill of lading is relevant because it shows that at all material times the defendant had intended and consented to effect delivery at the behest of Summerwind without the production of original bills of lading.

[110] Further the evidence bears out the fact that Summerwind coerced the defendant to issue false bills of lading, stating that it had problems with its bankers and shipments. It was therefore clear that the bills of lading to be issued would be relied upon by, inter alia, the plaintiff as well as bankers. Notwithstanding this, the defendant elected to issue the bills of lading with a false destination and failed at any time thereafter to rectify or check on the effects and consequences of its representations. Given this, it ill behoves the defendant to justify its misdelivery of the cargo at Port Klang to Mewah Oils Sdn Bhd.

[111] As matters stand there is no evidence before this court from which it can be inferred that the plaintiff acquiesced or accepted or consented to the discharge as it occurred. The testimony of PW2 does not disclose any such acquiescence or consent.

[112] The next point raised by the defendant is that the plaintiff had accepted Port Klang as the port of discharge when it submitted to the bankers the discharge port report issued at Port Klang. The basis for the defendant's submission is a document from Summerwind's bank rejecting the tender of the documents submitted by the plaintiff for payment which contains the following statement:

CERT OF WT N QLY/NOT ISSUED BY SGS AT DISCHARGE PORT

[113] The defendant maintains that as the discharge port report was a document required to be tendered by the plaintiff in order to procure payment under the letter of credit provided by Summerwind, the plaintiff '... must have inquired, ascertained and condoned the discharge of the cargo at Port Klang, in order to submit the necessary documents for payment under the LC'.

[114] The evidence relied on in support of this proposition is that of PW2 as follows:

Q: And it was rejected because it was not tendered within the validity period of L/C, 7 November 2003?

A: It is not delay. It was still on time. It is right we are late too. Because why we are late in our L/C we are waiting for our document from Yan Tai because the final perhitungan yang masuk is on the discharging port at Yan Tai. But the vessel never reached Yan Tai.

Q: Did you chase up with Summerwind?

A: Yes. We have it.

...

Q: You needed to have the surveyor's report. What did you do to ascertain which vessel the port was at?

A: we had the reminder from Summerwind that we can't pay. After that we chased for the cargo.

[115] From the foregoing several points are raised to the fore. It is evident from a reading of the defendant's contention and the evidence above that there is no evidential basis for the defendant's contention that the plaintiff '... must have inquired, ascertained and condoned the discharge of the cargo at Port Klang in order to submit the necessary documents for payment under the LC'. None of the answers in the exchange above bear out such statements from the plaintiff or any basis to infer such a conclusion. In any event this issue was not put to any of the plaintiff's witnesses.

[116] Secondly the testimony of PW2 above shows that they were late in tendering the letter of credit because they were waiting for documents from Yan Tai so that they could make the final computation on the discharge port at Yan Tai. The vessel however never reached its stated destination as far as the plaintiff was concerned. This does not bear out the contention that the plaintiff enquired, ascertained and knew that the cargo was in Port Klang or that a discharge report at Port Klang was indeed procured. There is no evidence before the court to warrant such a conclusion. Again the issue of the procurement by the plaintiff of a discharge report at Port Klang was not put to PW2 or PW1. This contention therefore has no evidential basis.

[117] Even if I am wrong in so concluding I turn to consider the letter from Summerwind's bankers which contained the statement reproduced above, to the effect that the certificate of weight and quality was not issued by SGS at the discharge port as required under the terms of the letter of credit between Summerwind and the plaintiff. I agree with the submission by learned counsel for the plaintiff that on a plain and simple reading of this document, it suggests that the requisite certificate was simply not presented to the bank, thereby resulting in a rejection. This in itself cannot be taken to mean that the plaintiff knew that the Istana VI was discharging its cargo at Port Klang or that the plaintiff obtained a discharge report at Port Klang. Moreover when this issue, a matter of fact, was not put to the plaintiff's witnesses.

[118] Finally the defendant maintains that at the very least, the plaintiff was aware that the discharge of the cargo without original bills of lading was at Port Klang by reason of the communication between the plaintiff's bank and Summerwind's bank under the L/C whereby certain requirements were waived vide amendments. Again the oral evidence does not bear this out, as PW2 denied that the plaintiff was aware of the port of discharge being Port Klang. This was not challenged. Again the issue of amendments to the letter of credit and the issue of a requirement of a discharge report prior to payment being made were not issues which were put to PW2. Further, the plaintiff wrote to the defendant on 5 December 2003 seeking to ascertain the whereabouts of the cargo. The contemporaneous evidence therefore gives greater credence to the plaintiff's testimony that it did not know where the cargo had been discharged or the identity of the receiver.

[119] When the contemporaneous evidence and oral testimony at trial is contrasted with the terms of the letter of credit which forms the basis for the defendant's contention that the plaintiff knew that the discharge port was Port Klang, it appears to this court on a balance of probabilities that the plaintiff was indeed not aware that the defendant had discharged the cargo to Mewah Oils Sdn Bhd at Port Klang in October and November 2003, but only ascertained this fact later as a consequence of correspondence between the parties when the defendant advised the plaintiff so. As such the plaintiff could not have consented or acquiesced or authorised discharge in Port Klang to the receiver. Even if I am wrong in so concluding, it is my view that such knowledge on the part of the plaintiff, even if present, cannot amount to express consent, acquiescence or authorisation sufficient to excuse the defendant's discharge at a different destination to a third party without production of original bills of lading. It would require clear evidence of a positive affirmation or authorisation from a representative of the plaintiff to excuse the defendant's discharge. If for example the defendant or Summerwind had contacted the plaintiff and procured authorisation for both the change in destination and discharge of the cargo, then matters might well have been different. However the failure to communicate with the plaintiff, coupled with the complicity between Summerwind and the defendant in the conversion of the cargo to meet Summerwind's contractual obligations, and the defendant's ready acceptance of the instructions to deliver against Summerwind's letter of indemnity cumulatively detract from the notion that the plaintiff either expressly or impliedly acquiesced or authorised the deviation and discharge of the cargo in Port Klang to the receiver, Mewah Oils Sdn Bhd.

Was the loss suffered by the plaintiff as a consequence of the loss of its cargo caused by the acts of the defendant, or was it caused by the intervening acts of a third party. Mewah Oils in procuring possession of the cargo from bonded shore tanks, which was outside the control of the defendant?

[120] The contention here is that the defendant is not liable for the loss

suffered by the plaintiff because Mewah Oils Sdn Bhd obtained possession of the cargo by procuring the release of the cargo from the Royal Customs Department by the use of what is alleged to be fraudulent means. These matters comprise the subject matter of a criminal prosecution in the Sessions Court in Klang under Charge Nos 63–29 of 2007 and 62–44 of 2007 and I make no comment or statement in relation to the subject matter of those charges. The issue taken in this forum is that of causation, the contention being that the chain of causation is broken by intervening acts on the part of Mewah Oils Sdn Bhd and the plaintiff, which resulted in the cargo coming into the possession of Mewah Oils Sdn Bhd. Mewah Oils is said to have allegedly utilised irregular means to procure customs approval for the release of the cargo from its own bonded shore tanks, while the plaintiff, it is contended, failed to present the bills of lading so as to secure possession of the cargo. The defendant had no control over both these events which it maintains comprise the substantive cause for the plaintiff's loss.

[121] The plaintiff contends otherwise, namely that it is the defendant's act in discharging the cargo without production of the original bills of lading that gave rise to the loss it suffered.

[122] It appears to this court that the evidence as a whole, discloses that the shore tanks into which the cargo was discharged were under the control of Mewah Oils Sdn Bhd. The documents referred to earlier relating to discharge of the cargo, such as the letter of indemnity issued by Summerwind, the notice of readiness and the e-mail issued by DW1 dated 24 October all underscore the fact that the defendant had at all times agreed to, and did deliver the cargo to the consignee, Mewah Oils Sdn Bhd as instructed by Summerwind. As I have concluded earlier, the discharge amounted to delivery in so far as the cargo was placed within the control of Mewah Oils Sdn Bhd. The fact that Mewah Oils is then alleged to have irregularly procured possession of the cargo vis a vis the customs does not detract from the fact that the cargo was made available to Mewah by the defendant and Summerwind. This subsequent act on the part of Mewah Oils Sdn Bhd cannot be said to be the cause of the plaintiff's loss because such loss was caused by the discharge or delivery of the cargo in Port Klang to the receiver without production of the original bills of lading. In other words, but for the discharge of the cargo into those bonded shore tanks belonging to Mewah Oils Sdn Bhd at the behest of Summerwind without bills of lading, the loss would not have occurred. The act of discharging cargo belonging to the plaintiff into the hands of a third party at a different destination to that contracted for under the bill of lading is the act or event that caused the loss.

[123] As for the plaintiff's retention of the bills of lading, this cannot be the cause of the loss because the plaintiff could not be expected to know or to

present the bills of lading in Port Klang on 26 October, when the defendant itself had represented to the plaintiff that it would be carrying the goods to Yantai, China and made no effort to advise the plaintiff or to check whether Summerwind had made the necessary communications with the plaintiff with regards to the cargo. The plaintiff as the unpaid vendor of the cargo, was fully entitled to demand possession of the cargo in keeping with the fact that it remained in possession of the bills of lading, as it does until today. Therefore neither of these acts can be construed as comprising the effective cause of the loss suffered by the plaintiff.

CONCLUSION

[124] From the entirety of the judgment thus far the court has concluded:

(a) In relation to the issue of title to sue that the plaintiff enjoys the locus standi or title to sue in tort for misdelivery or breach of duty and conversion, as the property and title in the cargo had passed to it at the time when the cargo was discharged by the defendant in Port Klang to Mewah Oils Sdn Bhd. It was in fact concluded that property in the cargo had passed to the plaintiff as of 24 October. The plaintiff also enjoys basis to sue under s 1 of the Bills of Lading Act as the lawful holder or endorsee, because the property in the cargo passed upon or by reason of the endorsement on the bills of lading;

(b) In relation to the contention that the defendant has no liability because it only discharged the oil into bonded shore tanks but did not deliver the same to Mewah Oils Sdn Bhd that there is no such distinction and on the facts of this case it is clear that there was effective delivery to Mewah Oils Sdn Bhd when the defendant discharged the cargo between 24 and 26 October at Port Klang;

(c) It was concluded that there was no evidential basis to bear out the contention that the plaintiff acquiesced or consented to the discharge of the cargo at Port Klang to Mewah Oils Sdn Bhd as a consequence of the terms of the letter of credit issued in relation to the sale transaction between itself and Summerwind, and the fact that such letter of credit was rejected on the grounds, inter alia, that no discharge report was produced at the port of discharge. These events did not comprise positive evidence of the plaintiff consenting or acquiescing to the deviation in the voyage and the discharge to an unknown third party; and

(d) Finally it was concluded that it was the defendant's act in delivering the cargo at Port Klang to Mewah Oils Sdn Bhd that was the effective cause of the loss suffered by the plaintiff rather than either:

    (i) The alleged acts of Mewah Oils in obtaining possession of the oil from its shore tanks in relation to duties payable to the customs; and

(ii) The plaintiff in failing to present the bills of lading in Port Klang on 26 October 2003 or soon thereafter so as to procure possession of the cargo in Mewah Oils bonded shore tanks.

[125] From the foregoing it is apparent that the various defences put forward by the defendant have not succeeded for the reasons set out in the course of this judgment. As such it appears to this court that the plaintiff has proved its case on a balance of probabilities. However the plaintiff has also pleaded a cause of action in bailment against the defendant, which comprises an alternative basis for its claim. As I have effectively concluded that the plaintiff has made out its case in tort and under the Bills of Lading Act it does not appear to be necessary to consider this additional cause of action in any great detail. Notwithstanding this, the cause of action in bailment is considered briefly below.

CONTRACT OF BAILMENT

[126] The bills of lading issued by the defendant signified that the plaintiff's cargo was loaded onto the defendant's vessel at Dumai on 23 October. Apart from stating the destination as Yantai, China, the bills of lading (as outlined at the outset) disclose that the cargo appeared to be shipped in apparent good order and condition by KPB and also showed precisely which of the ship's tanks contained the plaintiff's cargo. The bills of lading amounted to an acknowledgement of the defendant's bailment of the cargo described in the bill of lading. As such the defendant's duty vis a vis the cargo was to store it safely on board the vessel and discharge it at the stated destination. As such the defendant was the bailee of the plaintiff's cargo.

[127] *Halsbury's Laws of Malaysia* on bailment define it as follows:

> ... A bailment, traditionally defined, is a delivery of personal chattels on trust, usually on a contract, express or implied, that the trust shall be duly executed, and the chattels redelivered in either their original or an altered form, as soon as the time or use for, or condition on, which they were bailed shall have elapsed or been performed. Under modern law a bailment arises whenever one person (the bailee) is voluntarily in possession of goods belonging to another person (the bailor). The legal relationship of bailor and bailee can exist independently of any contract, and is created by the voluntary taking into custody of goods which are the property of another, as in cases of sub-bailment or of bailment by finding. The element common to all types of bailment is the imposition of an obligation, because the taking of possession in the circumstances involves an assumption of responsibility for the safe keeping of the goods. An action against a bailee can be regarded as an action on its own, sui generis, arising out of the possession had by the bailee of the goods.

[128] As such the burden of showing that proper care was taken of the plaintiff's goods lies with the defendant (see *Port Swettanham Authority v TW*

Wu and Company (M) Sdn Bhd [1978] 2 MLJ 137). Section 104 of the Contracts Act 1950 in this context provides:

> 104 In all cases of bailment the bailee is bond to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances take of his own goods of the same bulk, quality and value as the goods bailed.

[129] The plaintiff enjoys locus as bailor in view of the fact that KPB endorsed and transferred the original bills of lading to the plaintiff on 24 October. In this context the defendant contends that only a party entitled to immediate possession of the cargo and who had possession of the bills of lading between 24 and 26 October would enjoy rights to claim under this cause of action. I have earlier concluded that the plaintiff did indeed have possession of the bills of lading at that point in time as lawful holder and endorsee thereby rendering the defendant the bailee of its cargo. The plaintiff enjoyed both title or ownership of the cargo as well as possessory rights as of 24 and 26 October. In the instant case it is clear on the evidence that the defendant did not make any equiries as to the entitlement of the cargo, albeit vis a vis Summerwind or Mewah Oils Sdn Bhd prior to discharging the same (see evidence of DW1). Neither was the plaintiff contacted at any point in time. Although the defendant maintains that it did not know who held the bills of lading at that point in time, it is equally apparent from the shipping instructions issued by the plaintiff to the defendant, the prior relationship between the two and the terms of the letter of indemnity between Summerwind and the defendant, that the defendant could quite easily have ascertained albeit from Summerwind or the plaintiff, whether discharge in Port Klang was authorised. The letter of indemnity contains an undertaking from Summerwind to deliver all original bills of lading to the defendant when they came into its possession. In its initial e-mail to the defendant seeking the defendant's consent to issue bills of lading with a 'false' destination, Summerwind further stated that it would surrender the bills of lading to the owners in exchange for new sets of bills of lading stating the actual discharge port as being Port Klang. None of these undertakings was fulfilled. Neither did the defendant make any attempt to ascertain whether the false bills of lading had been replaced, despite knowing at all times that they contained false representations. Given these matters it is clear that the defendant failed in carrying out its duties as bailee.

[130] Finally as bailee the defendant was bound to deliver the cargo against surrender of the original bills of lading (*Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* [1959] MLJ 200). The defendant chose to discharge the cargo against the letter of indemnity issued by Summerwind instead thereby failing to show that it had discharged its duties adequately as bailee. The defendant was entrusted with the safe custody and delivery of the cargo, which it failed to do. Accordingly the defendant is also liable as bailee for the loss of the plaintiff's

cargo.

THE RELIEF

[131] By reason of my conclusion on liability, namely that the defendant is indeed liable for the loss suffered by the plaintiff the next issue that requires consideration is the relief or measure of damages sought by the latter. It is evident that a delivery up of the cargo is not possible, as the cargo is or was placed in the possession of Mewah Oils Sdn Bhd in 2003. As such the appropriate remedy is damages and such damages should of necessity reflect the cost of the cargo the plaintiff. It is not in dispute that the cost of the 1,998.518 metric tons of crude palm oil cost the plaintiff USD736,750. Additionally, the plaintiff is entitled to interest at the rate of 8%pa on the said sum from date of loss until satisfaction of the claim. I have awarded interest at the rate specified from the date of the incident as the plaintiff's loss arose from that date and ought not to be restricted to post judgment interest only. Finally the plaintiff is also awarded the costs of this action.

Plaintiff's actions allowed with costs.

Reported by Kanesh Sundrum